

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 145.

M. KIRMEYER, PLAINTIFF IN ERROR,

vs.

THE STATE OF KANSAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED APRIL 14, 1915.

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a In the Supreme Court of the State of Kansas.

No. 18396.

THE STATE OF KANSAS, Appellant,

v.

M. KIRMEYER, Appellee.

Be it remembered, that on the 20th day of August, 1912, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, certified copies of the Notice of Appeal and Proof of Service thereof, and of Journal Entry of Judgment of the District Court of Leavenworth county, which Notice, proof of Service and Journal Entry, are in words and figures as follows, to-wit:

b Filed Aug. 20, 1912. D. A. Valentine, Clerk Supreme Court.

In the District Court of Leavenworth County, State of Kansas.

No. 17059.

THE STATE OF KANSAS, Plaintiff,

vs.

M. KIRMEYER, Defendant.

Notice of Appeal.

To the defendant M. Kirmeyer, and A. E. Dempsey and F. P. Fitzwilliam, his attorneys of record:

You are hereby respectfully notified that The State of Kansas, Plaintiff in this action, will take an appeal to the Supreme Court of the State of Kansas, in this case, for the purpose of reversing the judgment of the District Court of Leavenworth County Kansas, in favor of the Defendant herein, overruling the motion of said plaintiff for judgment in its favor and refusing to grant said plaintiff a new trial in this cause.

JOHN S. DAWSON,

Attorney General of the State of Kansas;

S. M. BREWSTER,

Assistant Attorney General;

LEE BOND,

County Attorney of Leavenworth County, Kansas;

ARTHUR M. JACKSON,

Attorneys for Plaintiff.

Service of the above notice of appeal acknowledged by the defendant on this 19th day of August A. D. 1912.

A. E. DEMPSEY AND

F. P. FITZWILLIAM,

Attorneys for Defendant.

THE STATE OF KANSAS,

First Judicial Dist., Leavenworth County, ss:

I, C. C. Smith, Clerk of the District Court of the First Judicial District of the State of Kansas, sitting within and for the County aforesaid, do hereby certify *that* the above and foregoing to be true, full and complete copy of Notice of Appeal in the therein entitled cause as the same remains on file in my office.

Witness my hand, and seal of said Court, affixed at my office in the City of Leavenworth, this the 19 day of August, A. D. 1912.

C. C. SMITH,
Clerk of the District Court,
By A. C. SMITH, *Deputy.*

(Endorsed:) No. 18396. District Court, Leavenworth County, Kansas. State of Kansas, Appellant v. M. Kirmeyer, Appellee. Notice of Appeal and Proof of Service. Filed Aug. 20, 1912. D. A. Valentine, Clerk Supreme Court.

c Filed Aug. 20, 1912. D. A. Valentine, Clerk Supreme Court.

No. 17059.

THE STATE OF KANSAS, Plaintiff,

vs.

M. KIRMEYER, Defendant.

On this 20th day of July A. D. 1912, came the parties hereto and thereupon came on for hearing the motion of the plaintiff to modify certain findings of fact, heretofore made by the court in this cause, in the particulars set forth in said motion, and the Court having heard the arguments of counsel thereon and being well advised in the premises, sustained the 3rd paragraph of said motion to the extent of inserting the words "in the City of Leavenworth, Kansas", between the words "customers" and "periodically" in the 7th finding of fact, and overruled said motion as to the 1st, 2nd, 4th, 5th, 6th, 7th, 8th, 9th, and 10th paragraphs thereof, to which ruling and decision of the Court in modifying said 7th finding the defendant duly objected and excepted and to which ruling and decision of the Court in overruling the 1st, 2nd, 4th, 5th, 6th, 7th, 8th, 9th and 10th paragraphs of said motion the plaintiff duly objected and excepted.

Thereupon the motion of the plaintiff for judgment in its favor and to grant it a permanent injunction as prayed for in its amended petition upon the testimony and evidence introduced in this cause, came on for hearing and the Court having heard the arguments of counsel thereon and being well advised in the premises, overruled said motion, to which ruling and decision of the Court the plaintiff duly objected and excepted.

It is therefore, now by the Court considered, ordered and adjudged that the defendant have and recover of and from the plaintiff the costs of this action, taxed at \$— to which judgment the plaintiff duly objected and excepted.

(Endorsed:) No. 18396. District Court of Leavenworth County, Kansas. State of Kansas, Appellant vs. M. Kirmeyer, Appellee. J. E. of Judgment. Filed Aug. 20, 1912. D. A. Valentine, Clerk. District Court.

THE STATE OF KANSAS,

First Judicial Dist., Leavenworth County, ss:

I, C. C. Smith, Clerk of the District Court of the First Judicial District of the State of Kansas, sitting within and for the County aforesaid, do hereby certify that the above and foregoing to be true, full and complete copy of Journal Entry in the therein entitled cause as the same remains of record in my office.

Witness my hand, and seal of said Court, affixed at my office in the City of Leavenworth, this 19 day of August A. D. 1912.

[SEAL.]

C. C. SMITH,
Clerk of the District Court,
By A. C. SMITH, *Deputy.*

d Filed Aug. 20, 1912. D. A. Valentine, Clerk Supreme Court.

No. 18396.

THE STATE OF KANSAS, Plaintiff,

vs.

M. KIRMEYER, Defendant.

On this 27th day of July A. D. 1912, came the parties hereto and thereupon came on for hearing the motion of the Plaintiff for a new trial of this cause, and the Court having heard the arguments of Counsel thereon and being well advised in the premises, overruled said motion, to which ruling and decision of the Court the Plaintiff duly objected and excepted.

(Endorsed:) No. 18396. District Court, Leavenworth County, Kansas. State of Kansas, Appellant, vs. M. Kirmeyer, Appellee. J. E. Filed Aug. 20, 1912. D. A. Valentine, Clerk Supreme Court.

THE STATE OF KANSAS,

First Judicial District, Leavenworth County, ss:

I, C. C. Smith Clerk of the District Court of the First Judicial District of the State of Kansas, sitting within and for the County aforesaid, do hereby certify that the above and foregoing to be true, full and complete copy of Journal Entry in the therein entitled cause as the same remains of record in my office.

Witness my hand, and seal of said Court, affixed at my office in the City of Leavenworth, this the 19th day of July A. D. 1912.

[SEAL.]

C. C. SMITH,
Clerk of the District Court,
By A. C. SMITH, *Deputy.*

e Be it further remembered, that afterwards, on the 12th day of September, 1912, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas an Abstract of Record prepared by the appellant herein, which abstract is in the words and figures as follows, to-wit:

1 & 2 Filed Sep. 11, 1912. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court of the State of Kansas.

No. 18396.

THE STATE OF KANSAS, Appellant,

v.

M. KIRMEYER, Appellee.

Abstract of Record of Appellant.

John S. Dawson, Attorney-General of the State of Kansas; S. M. Brewster, Assistant Attorney-General; Lee Bond, County Attorney of Leavenworth County, Kansas; Arthur M. Jackson, Attorneys for Appellant.

3 In the Supreme Court of the State of Kansas.

No. —.

THE STATE OF KANSAS, Appellant,

v.

M. KIRMEYER, Appellee.

Abstract of Record of Appellant.

The amended petition filed by The State of Kansas, in the district court of Leavenworth county, reads as follows:

Now comes The State of Kansas, by John S. Dawson, the duly elected, qualified and acting attorney-general of said state, and by Lee Bond, the duly elected, qualified and acting county attorney of Leavenworth county, Kansas, who prosecuted this case in the name of and for the said State of Kansas, and for cause of action and for equitable relief against the above-named defendant, alleges:

1. That at the time of the institution of this action the above-named defendant was and still is a resident and citizen of the city and county of Leavenworth, state of Kansas.

2. That for many months before the institution of this action the said defendant was, and still is, engaged in the unlawful sale, barter and delivery of intoxicating liquors within the said city and county of Leavenworth, state of Kansas, in the form and manner as hereinafter alleged and set forth.

3. That for many months before the institution of this action the said defendant was, and still is, maintaining and operating a so-called storeroom or warehouse, or a shift, device or subterfuge, at a place called Stillings, in Platte county, state of Missouri, just across the Missouri river, about one mile east of said city of Leavenworth, state of Kansas, at which place the said defendant, at all of the times herein mentioned, has been and still is temporarily unloading and storing intoxicating liquors for the express unlawful purpose, intent and design of thereafter selling, bartering and delivering the same wholly within said city and county of Leavenworth, state of Kansas, as herein more fully alleged and set forth.

4. That for many months before the filing of the original petition in this action the said defendant has owned, maintained, used and employed, and is still maintaining, using and employing upon all the streets and alleys of the city of Leavenworth, Kansas, certain wagons, vehicles, conveyances, with horses or mules hitched thereto and drivers thereon, for the express unlawful purpose of conveying or carrying said intoxicating liquors across said Missouri river from said town of Stillings, Missouri, to and within said city and county of Leavenworth, state of Kansas, and there selling, bartering and delivering said intoxicating liquors to various persons and places, whose names and location are now unknown to said plaintiff, with the express purpose, intent and design on the part of said defendant of unlawfully aiding and abetting many of said persons in the violation of the prohibitory laws of said state of Kansas, as herein more fully alleged and set forth.

5. That for many months before the institution of this action the said defendant did and does still maintain and operate a local Leavenworth city telephone at his said so-called store-room or warehouse, or said shift, device and subterfuge, at said town of Stillings, Missouri, which said telephone at all of the times herein mentioned was and still is directly connected with residences and places of business within said city and county of Leavenworth, Kansas, over which said telephone the said defendant, his agents and employees have at all of the times herein mentioned, and still is, taking and receiving telephone orders for said intoxicating liquors at said so-called storeroom or warehouse, or said shift, device or subterfuge, at said town of Stillings, Missouri, and thereafter selling, bartering and delivering said intoxicating liquors, so ordered, to said residences, persons and places of business wholly within said city and county of Leavenworth, Kansas, in violation of the said prohibitory laws of said state of Kansas, as herein more fully alleged and set forth.

6. And plaintiff alleges that at all of the times herein mentioned it has been and still is the unlawful custom, habit or system of the said defendant, his agents and employees to collect the sale price of said intoxicating liquors, so delivered upon said telephone orders as aforesaid, wholly and entirely within said city and county of Leavenworth, state of Kansas, in violation of the prohibitory laws of the said state of Kansas.

7. Plaintiff further alleges that at all of the times herein men-

tioned the said defendant has maintained, used and employed a local Leavenworth city telephone at his residence at No. 702 North Third street, in the said city of Leavenworth, Kansas, over which said telephone the said defendant has at all of the times herein mentioned received and does still receive orders for intoxicating liquors

5 from residences, persons and places of business wholly within said city and county of Leavenworth, Kansas, and thereafter delivers the same to said residences, persons and places of business, by means of said wagons, vehicles and conveyances, from said so-called store-room or warehouse, or said shift, device and subterfuge, at said town of Stillings, Missouri, or from said wagons, wherever they may be on the streets and alleys of said city of Leavenworth, Kansas, and thereafter collects the sale price of said intoxicating liquors wholly within said city and county of Leavenworth, Kansas, all in violation of the prohibitory laws of said state of Kansas.

8. Plaintiff further alleges that at all of the times herein mentioned the said defendant has authorized, directed and allowed, and does still authorize, direct and allow the drivers of said wagons, vehicles and conveyances, who are in his employ, and also other agents and employees, whose names are unknown to said plaintiff, to solicit, take and receive orders for said intoxicating liquors at residences, places of business, and of various persons, whose names are unknown to plaintiff, wholly within said city and county of Leavenworth, Kansas, and on the streets and alleys of said city, and upon such orders the said defendant has, at all of the times herein mentioned, delivered and is still delivering said intoxicating liquors to said residences, persons and places of business from said so-called storeroom or warehouse, or said shift, device or subterfuge, at said town of Stillings, Missouri, and from said wagons, on the streets and alleys of said city of Leavenworth, Kansas and thereafter collecting the sale price of said intoxicating liquors wholly within said city and county of Leavenworth, Kansas, all in violation of the prohibitory laws of said state of Kansas.

9. And plaintiff further alleges that at all of the times herein mentioned the said defendant has kept, and does still keep, said wagons, vehicles, conveyances, horses, mules and drivers within said city and county of Leavenworth, Kansas, especially at night, at places unknown to said plaintiff, and that frequently the said wagons, vehicles or conveyances are kept loaded over night with intoxicating liquors, which are delivered the next morning to various residences, persons and places of business within said city and county of Leavenworth, Kansas, and the sale price thereafter collected wholly within said city and county of Leavenworth, state of Kansas, all in violation of the prohibitory laws of said state of Kansas.

10. And plaintiff further alleges that a very large part or proportion of the said places and persons to whom or which said intoxicating liquors are sold, bartered and delivered, in the manner herein alleged, are thereafter selling, bartering and delivering said intoxicating liquors in violation of the prohibitory laws of the state of

6 Kansas; that the said defendant well knows this to be a fact, and that said defendant at all of the times herein mentioned has been, and still is, selling, bartering and delivering said intoxicating liquors to them as herein alleged and set forth, for the express unlawful purpose and within the express unlawful intent and design of aiding and abetting them in violating said prohibitory laws of said state of Kansas.

11. And plaintiff further alleges that the said defendant has adopted, employed and used, and is now adopting, employing and using, the said so-called storeroom or warehouse at said town of Stillings, Missouri, and said wagons, vehicles, conveyances, horses, mules, drivers telephones and all other property or means employed as herein alleged purely and simply as devices, shifts and subterfuges to attempt to avoid and violate the said prohibitory laws of said state of Kansas.

12. And plaintiff further alleges that said defendant has, at all of the times herein mentioned, pretended, and does still pretend, to be engaged in interstate commerce in selling, bartering and delivering said intoxicating liquors as herein alleged, but plaintiff alleges that he has and is conducting said unlawful business as herein alleged wholly within said state of Kansas, and is not bona fide engaged in any interstate commerce business.

13. Plaintiff further alleges that at all of the times herein mentioned the said defendant has received and does still receive said intoxicating liquors at his said so-called storeroom or warehouse, or at said shift, device or subterfuge, at said town of Stillings, Missouri, in original packages, and that said intoxicating liquors are there taken out of said original packages by the said defendant, and thereafter sold, bartered and delivered to said residences, persons and places of business within said city and county of Leavenworth, Kansas, in other than their original packages, suitable for the use and convenience of said residences, persons and places of business within said city and county of Leavenworth, Kansas.

14. Plaintiff further alleges that this is an action in which The State of Kansas is entitled to an injunction, and that unless said defendant, his agents and employees are restrained and enjoined from doing and performing the unlawful acts and omissions herein complained of they will continue in the violation of said prohibitory laws of the said state of Kansas in the manner and form herein alleged and set forth.

15. Plaintiff further alleges that for several months prior to the institution of this action the said defendant has kept and maintained, and does still keep and maintain, in the city and county of Leavenworth, certain warehouses or storerooms for the purpose of selling and storing intoxicating liquors therein, and for the purpose of storing empty cases, bottles and barrels, and for the purpose of the stabling of wagons loaded with intoxicating liquors, and
7 for the purpose of stabling teams and caring for the same, used in the transportation of intoxicating liquors from said town of Stillings, in the county of Platte, in the state of Missouri, and your petitioners are informed and believe that the said de-

fendant so keeps and maintains said warehouses or storeroom on premises known as No. 117 and No. 117½ Delaware street, in the city of Leavenworth, Kansas.

16. Plaintiff further alleges that a reasonable attorney's fee herein is the sum of five hundred dollars.

Wherefore, And because of all the matters and things alleged, said plaintiff prays and demands that a temporary injunction issue herein against said defendant, restraining him and his agents and employees from doing any of the unlawful acts herein complained of; that he be enjoined from conducting said unlawful business; that he be enjoined from maintaining, using and employing said wagons, vehicles, conveyances, horses, mules, telephones and any other property in the said unlawful manner herein alleged; that upon the final determination of this action said injunction be made permanent; that said wagons, vehicles, conveyances, horses, mules, telephones and other property used in said unlawful business be declared common nuisances and that the same be abated; that said plaintiff have and recover its costs herein, including said attorney's fee of \$500, and for such other and further relief herein as said plaintiff may be entitled to.

And thereafter the defendant, M. Kirmeyer, filed his answer to the petition, which, omitting the caption, is as follows:

Now comes the defendant, M. Kirmeyer, and for answer to the plaintiff's petition herein denies each, all and every allegation or averment in said petition contained, except as hereinafter admitted.

2. For a second and further defense to plaintiff's petition, this defendant avers that he has and keeps a wholesale liquor business in the town of Stillings, in Platte county, Missouri, which place of business he has kept for some years past, in which state of Missouri and under the laws thereof the sale and delivery of intoxicating liquors is a legitimate and lawful business, and that a large part of defendant's business is done with residents and inhabitants of the State of Kansas and other states, in which transactions this defendant sells in the state of Missouri to residents and inhabitants of other states wines, beer and liquors, and causes delivery thereof to be made in the original boxes, bottles and packages across the state line to purchasers in good faith in pursuance of sales so made in the state of Missouri, and this defendant claims and avers that under section 8 of article I of the constitution of the United States, he has a legal

right to so engage in interstate commerce and to make sales
8 and deliveries of wines, beer and liquor in the manner aforesaid without interference on the part of the plaintiff, its officers and agents, and his business is protected by the commerce clause of the constitution of the United States.

Wherefore, this defendant prays that he go hence without day and have and recover his costs herein expended.

The State moved the trial court to require the defendant to make this answer more definite and certain, its motion therefor, omitting the caption, being as follows:

First. That said defendant be required to state what part or portion of his business is done or transacted with residents or inhab-

itants of other states than the state of Kansas, and that he be required to name said other state, with the residents and inhabitants of which said defendant does business.

Second. That said defendant be required to specifically state in what manner or form and by what methods or means he receives orders for intoxicating liquors within the state of Missouri, and particularly at the town of Stillings, in Platte county, Missouri, and that he be required to state where said orders are received.

Third. That said defendant be required to definitely and specifically state how or by what means he delivers said intoxicating liquors within the state of Kansas, after receiving orders therefor.

Fourth. That said defendant be required to definitely and specifically state the nature or kind of boxes, cases, bottles and packages in which said intoxicating liquors are received at said town of Stillings, Missouri, and that he be required to further state the nature or kind of boxes, cases, bottles and packages in which said intoxicating liquors are thereafter delivered within the state of Kansas.

Fifth. That said defendant be required to state whether or not said intoxicating liquors are delivered to purchasers within the state of Kansas free of transportation charges to said purchasers within the state of Kansas.

This motion, upon argument, was overruled by the trial court, The State duly objecting and excepting.

The reply of The State was a general denial.

No temporary injunction has been issued.

The case came on for trial upon its merits on June 3, 1912, in the district court of Leavenworth county, Kansas.

9 That State placed the defendant, M. KIRMEYER, on the witness stand, and he testified in substance as follows:

Direct examination by Mr. JACKSON:

That his name is Mike Kirmeyer. That he has resided at No. 702 North Third street, in Leavenworth, Kan., about thirty years. That he is in the beer business at Stillings, Mo. That Stillings is about a mile and a quarter east of Leavenworth, across the Missouri river. That a railroad and wagon bridge crosses the river connecting Leavenworth with Stillings.

Q. How long have you been in the liquor business in Stillings, Mo., Mr. Kirmeyer?

A. Why, ever since those receivers were here; at that time we moved across. (Rec. 2.)

This was about four or five years ago. I was in the liquor business in Leavenworth before I moved across. Have been in that business off and on all my life; that is, since I was old enough. Before I moved across I received my liquors here in Leavenworth. I have been receiving my liquors at Stillings since I moved across. There is a freight depot at Stillings, but no agent there. I am a dealer in a beer known as Rochester beer. It comes from Kansas City, Mo. That is the only beer I handle. Nearly all of it comes

to Stillings in carload lots. I handle nothing but beer. The beer comes to me in regular beer cases, barrels and kegs. Some of the cars come to me over the Burlington and some over the Chicago Great Western. Some of it comes over the Missouri Pacific. Where it comes over the Missouri Pacific it is unloaded at the freight depot in Leavenworth and I haul it across the river in my own wagons. I do not deliver any from the Missouri Pacific depot in Leavenworth. When I get an order for beer from Oskaloosa, Topeka and other points in Kansas I bring the beer over to the freight depots in Leavenworth, Kan., in my own wagons and ship it out from there. I do this because there is no freight agent at Stillings, Mo. Leavenworth is the only place to load it. Ever since I have been doing business at Stillings I have had stables and warehouse at Nos. 117 and 117½ Delaware street, in Leavenworth, Kan. I keep my horses and wagons there. I have quite a few wagons there. These horses and wagons belong to me. I have both Leavenworth telephones at Stillings, Mo. The numbers of these phones are 54 on the Bell and 101 on the People's. I also have both phones at my stables, at No. 117 and 117½ Delaware street, in Leavenworth. Both of these phones have the same number. It is 313. I also have a telephone at my home in Leavenworth. I receive my orders for beer at Stillings, some by letter and some by phone. There is no postoffice at Stillings. I get my mail in Leavenworth, but I do not open up my beer orders there. I either remail them to

10 Stillings or take them over there before opening them. I open up personal letters in Leavenworth.

Q. What per cent of your orders for beer from Leavenworth, Kan., do you receive by mail?

A. Well, we do not get but about 15 per cent.

Q. Then 85 per cent from Leavenworth are telephone orders? (Rec. 20.)

A. Yes, sir. My telephones are all connected directly with "central" at Leavenworth. I pay no toll except my monthly bill.

Q. The same as any other telephone. Now Mr. Kirmeyer, you receive orders for beer at No. 117 Delaware street, do you not?

A. Why, once in awhile. We tell them to call up the other number. (Rec. 21.)

I carry an ad. in the Labor Chronicle and Resubmissionist and also in the German Tribune, weekly newspapers circulating in Leavenworth. The one in the former paper, under date of May 31, 1912, is mine.

This advertisement was received in evidence, and is as follows:

MICHAEL KIRMEYER,
STILLINGS, MO.
ROCHESTER BEER.
Family Trade Especially.
Phones 313.

(Rec. 23.)

Phones 313 mentioned in this add. is the number of both of my phones at No. 117 Delaware street, in Leavenworth. I employ my own wagons, teams and drivers in delivering beer in

Leavenworth. A few customers occasionally come over to Stillings and get it. Once in awhile a driver lays off or there is a rush, and then I hire wagons to deliver for me. I pay them. My wagons usually come over once a day. Sometimes we fill special orders. If customers are in a rush we accommodate them. I can not name any customer who is charged for delivering beer to him. (Rec. 28.) I can not remember a single case in which I have made any charge for delivery. (Rec. 28.) My drivers are not supposed to take orders for beer as they go around to make deliveries. They do not do this that I know of. Most of my trade in Leavenworth is what is called "family trade." My drivers deliver the beer at residences. When the order is received at Stillings over the telephone the name of the party is put on a tag or label, this is either given to the driver or put on a case of beer in the warehouse at Stillings and then my drivers haul the cases across the Missouri river and deliver them. We use the streets and alleys in making these deliveries.

11 Q. Now what is your method of collecting your bills for liquor, Mr. Kirmeyer?

A. Well, I collect once in a while, and I have a collector.

Q. How often?

A. Sometimes I collect every day, sometimes some people once a month, sometimes collect once a week, some every two months or so, or when I get around.

Q. Where do you collect those bills?

A. You mean here in town?

Q. Yes, wherever you collect them.

A. Wherever I happen to find the party.

Q. Do you collect them here in Leavenworth?

A. Why, yes sir.

Q. Do your drivers ever collect bills for you?

A. I send them out with a few sometimes when they are away out in the outskirts. (Rec. 29, 30.)

My business in Leavenworth amounts to \$700 or \$800. That includes the empties. When the empties are returned the customer gets credit for them. My actual sales in Leavenworth amount to \$400 or \$500 a week. I am not an agent of the Rochester Brewing Company; I am a dealer. My drivers take up the empties around town. They load them in a car in the yards here in Leavenworth, and when the car is filled I ship them back to Kansas City, Mo.

Q. Now, when your drivers go around to take up these empties they sometimes collect from customers, don't they?

A. Why, they do if I give them a bill, a statement.

Q. And how often do you give them a bill to collect when they take up empties?

A. Well, I could not remember as to that.

Q. About how often?

A. Oh, I could not say; it depends on what locality they are going to and who the customers are. Most of the people I collect from. (Rec. 35, 36.)

Q. Now, Mr. Kirmeyer, about what per cent of your business here in the city, liquor business in the city, is family trade?

A. About all of it. (Rec. 37.)

Q. How do they, your wagons and drivers, reach these different residences?

A. How do they reach them?

Q. Yes.

A. I do not understand that.

Q. Do they use the streets and alleys of Leavenworth?

A. I suppose they do.

Q. How many towns in Kansas, Mr. Kirmeyer, do you ship liquors to from Leavenworth?

A. Why, in Kansas?

Q. Yes.

12 A. Oh, I suppose about fifteen or twenty, I guess. (Rec. 38.)

Q. You spoke, in the early part of your testimony, of receivers being appointed. Do you remember, Mr. Kirmeyer, what court appointed them?

A. No, I don't.

Q. Was it the supreme court of Kansas?

A. I could not say that.

Q. What did those receivers do here, so far as you were concerned?

A. Why, they scared everybody up.

Q. After that you moved across the river?

A. Everybody moved. (Rec. 44.)

Q. You have more family trade than you had then?

A. Why yes, in family trade.

Q. Did you do any family trade before you went to Stillings?

A. Yes, sir.

Q. Delivered liquor at residences?

A. Delivered beer.

Q. Delivered beer at residences. What change, if any, has been made in your method of doing business, so far as the family trade is concerned, since you went to Stillings?

A. Well, there ain't much change in the way of doing business. (Rec. 46.)

Cross-examination by Mr. DEMPSEY:

Over the objections and exceptions of The State, Kirmeyer testified that he paid a revenue license and also a merchant's tax in the state of Missouri.

Q. Now you said something about occasionally having goods shipped in on the Missouri Pacific and taking them across the river. I will ask you to state if in all cases you take those goods from the freight depot when they are shipped to this point, take them to Stillings, Mo., before you send them elsewhere?

A. Yes. (Rec. 49.)

My predecessor in business in Leavenworth had the ad. in The Labor Chronicle and I never changed it.

The Court:

Q. He didn't have the name "Michael Kirmeyer" part in there, did he?

A. No, I had them change that.

Q. Are you still carrying the ad. in there?

A. I didn't know it was in there.

Q. Are you not paying for it?

A. Yes, I pay for it. (Rec. 50.)

13 Over the objections and exceptions of The State, that the questions called for a conclusion of the witness, Kirmeyer was allowed to testify that all of his orders for beer were received in Missouri and that all shipments were made from Missouri.

By Mr. DEMPSEY:

Q. You say you have a regular collector who goes around and collects?

A. Yes, sir.

Q. And you sometimes collect yourself?

A. Mostly. (Rec. 52, 53.)

Redirect examination by Mr. JACKSON:

Q. Mr. Kirmeyer, I wish you would state to the court what Stallings, Mo., consists of in the way of buildings?

A. It consists of mostly—it has a store there; a depot, that is, a roundhouse—there is no depot there. A roundhouse, and ten or fifteen residences, I suppose.

Q. How many beer warehouses are there over there—liquor warehouses?

A. Oh, there is about eight or ten strung along. I don't know; I could not tell. (Rec. 53, 54.)

On re-direct examination he further testified that he sold beer to two saloonkeepers in Platte City, in Platte county, Missouri, about seven miles from Stillings, and that he also had some family trade in Platte county, but that he did not deliver his beer to any of his trade in his own wagons; that the beer that was taken by the saloons at Platte City was shipped direct from Kansas City to them and that he received credit for it.

Q. Do you haul any in your own wagons to residences in Platte City?

A. No.

Q. All of your wagon trade, then, is with Leavenworth county?

A. Not all.

Q. Where else do you have any wagon trade?

A. We haul it anywhere it is ordered.

Q. Well, where?

A. That is about the only place you can haul with a wagon, Leavenworth, that is all I know of.

Q. Do you haul that liquor to any other county than Leavenworth county in your own wagons?

A. I would have to ship too far?

Q. Well, do you?

A. I suppose I do.

14 Q. Well, to whom and where?

A. I could not tell you just now, unless I looked in my books. I don't keep all that stuff in my mind. (Rec. 57, 58.)

Q. You don't claim to have a government license in Kansas, do you?

A. No, sir.

Q. There is another thing I want to ask you about that I didn't ask you about in your direct examination. When these liquors are received by you at Stillings, they are all taken out of the car?

A. Yes, sir. (Rec. 63.)

Q. And you hold those shipments there until you are ready to deliver them on orders here in Leavenworth?

A. We deliver them as we get the orders. (Rec. 63.)

Q. Speaking of this ad. again. You also carry an ad. in the German Tribune?

A. Yes, sir.

Q. The same ad.?

A. Yes, sir. (Rec. 63.)

Recross examination by Mr. DEMPSEY:

Q. Counsel tries to make out here that you only ship and take beer over to Leavenworth county. Do you advertise elsewhere than in these papers?

A. No, I do not. I do not do any advertising at all. (Rec. 66.)

In testifying with relation to his shipments of beer to points in Kansas, he said:

Q. In each case you do deliver the liquors at the depot here in Leavenworth?

A. That is the only place you can take it if you want to ship it.

Q. Is there any freight office at Stillings of any kind?

A. No, they have none. (Rec. 68, 69.)

Redirect examination by Mr. JACKSON:

Q. Take shipments at some distance from Leavenworth. Whenever you ship, in all cases you bring the liquor across the river in your own wagons and deliver it at the freight houses?

A. Yes, sir; that is, orders that I get in Missouri. (Rec. 71.)

Later on in the trial Kirmeyer was recalled by The State, and upon direct examination by Mr. Jackson, he testified:

Q. Suppose a telephone order comes in at No. 313 Main, what do you do with it?

A. We tell them to call up across the river; that is, I give them orders to do that; I am not always there. (Rec. 97.)

15 Q. Do you own real estate over there—your warehouses?

A. Why, I lease it.

Q. You do not own the building?

A. No, I do not; I pay rent (Rec. 101, 102.)

Cross-examination by Mr. DEMPSEY:

Q. I forgot to ask you in relation to these orders that you get in your place of business in Missouri. In filling those orders, I will ask you to state whether or not you put on each package or each box, as the case may be, the name of the person who gives the order?

A. Yes, sir.

Q. Now, you do that at your place of business in Missouri?

A. Yes, sir.

Q. So that whatever orders you deliver are delivered in the original packages?

By Mr. JACKSON: I object to the question as leading and calling for the conclusion of the witness.

By the COURT: Ask him how or what it is delivered in.

Q. Is it delivered in the package as it leaves your place of business in Stillings, Mo., that is, delivered in the same condition to the customer or consignee that it was in when it left your place of business in Missouri?

A. Yes, sir; packages are all sealed, and they are never opened until they get to the customer. (Rec. 104.)

By Mr. JACKSON:

Q. How do you seal those packages?

A. They are sealed in Kansas City.

Q. Addressed to you in carload lots?

A. They are not addressed to me; they are billed to me.

Q. And you put a label on there at Stillings—the name of the customer to whom it is to go in Leavenworth?

A. Yes, sir. (Rec. 105.)

Mr. KIRMEYER recalled by the COURT:

Q. Suppose you get an order from some man in Oskaloosa, accompanied by the cash in the envelope; what do you do in filling that order?

A. I make out the bill of lading and put a label on the cask or whatever it may be and ship it.

Q. Tell the routine in shipping. You say you make out a bill of lading over there?

A. Yes, sir; I make out a label and put the party's name on it and haul it down to the Santa Fe depot.

Q. What do you do with the label?

A. Put it on the case or cask, whichever it may be.

Q. Then you put it in your own wagon?

A. Sometimes. Sometimes I hire a wagon to take it to the road.

16 Q. Then what do you do with it?

A. We take it and deliver it to the railroad company.

Q. And then they sign a bill of lading?

A. Yes, sir.

Q. And turn it back to you?

A. Yes, sir. (Rec. 142, 143.)

Q. Suppose you get an order from here, from some man here in the city—say a money order in a letter; how do you fill it?

A. I make out one of those labels, put it on the wagon and send it to his house.

Q. Where is the case?

A. In the warehouse.

Q. Where is that?

A. At Stillings. (Rec. 143, 144.)

Redirect examination by Mr. BREWSTER:

Q. Do you place these labels on yourself or furnish them to the drivers?

A. I give them the labels and they paste them on.

Q. All liquor you ship to Oskaloosa you bill out from Leavenworth?

A. We bill it Stillings and they bill it Leavenworth.

Q. You send your driver with beer here to the depot in Leavenworth and they ship it from Leavenworth?

A. I make out the bill of lading.

Q. Where do you deliver it to the railroad company?

A. At their depot.

Q. They don't take the bill of lading you make out?

A. They change it from Stillings to Leavenworth.

Q. They do not accept it as shipping it from Stillings?

A. Well, they have.

Q. They have no depot?

A. No, they have no depot.

Q. The first place it passes out of your hands is in the city of Leavenworth?

A. At the depot.

Q. Up to that time you have it in your possession, the possession of your driver?

A. Yes, sir.

Q. But you make out on blank bills, you make out a statement that it is shipped over the Santa Fe from Stillings to Oskaloosa?

A. Sometimes we put it "Leavenworth."

Q. Sometimes you put it "Leavenworth"—most times you put it "Leavenworth" don't you

A. They changed it.

Q. You didn't see any use putting it Stillings, and after they began to change it, you began to change it?

17 A. Yes, they told me they had no road running into Stillings.

Q. And the bulk of your shipments to Kansas points are billed from the city of Leavenworth, are they not?

A. Yes, sir.

Q. And never pass out of your hands until they reach the city of Leavenworth?

A. Why, of course not. (Rec. 144-147.)

Q. Now I believe you said that when any one would call you

up at No. 313 here for an order, you would tell them to call up at Stillings. Is that right?

A. Yes, sir.

Q. When they do call up there at No. 313 and ask for beer, you tell them to call up Stillings?

A. I would say, "Call up across the river."

Q. What would they tell you when you told them to call up across the river?

A. They would not say anything; they would say "all right."

Q. And then you accepted the order across the river?

A. Yes, sir. (Rec. 149.)

Q. How much is the largest amount of beer you ever received here by freight?

A. Oh, might be twenty cases.

Q. Over what road would this twenty cases come?

A. Why, I think once or twice they came on the Missouri Pacific.

Q. To whom were they billed?

A. They were billed, I suppose, to me.

Q. At this place?

A. They had to be billed to Leavenworth.

Q. At Leavenworth. Then you got notice from the railroad company that this beer was here in Leavenworth?

A. Yes, sir.

Q. Would you direct it to come to Leavenworth, Kansas?

A. Yes, sir.

Q. Then you would send your teams over?

A. Send in the teams.

Q. And get this beer out?

A. Yes, sir.

Q. Send your teams over here and haul the beer across to Stillings?

A. Yes, sir.

Q. And then haul it back from Stillings?

A. No, put it in the warehouse. (Rec. 150, 151.)

Q. These empties are all shipped—all of the empties are returned here to the city of Leavenworth and shipped over the road from here, are they not?

A. Why, we ship them from here.

Q. Most all of them?

18 A. Yes, sir.

Q. Why do you ship them from here?

A. Well, we have always shipped them from here—always have loaded them here, and have locks on the car down there and pay demurrage.

Q. Do you keep any empties at the barn over night?

A. Well, the drivers may.

Q. And you say that place was here. Where is it situated; where do you keep your wagons?

A. 117 Delaware street.

Q. Is that used in connection with your business across the river?

A. It is used for a barn.

Q. But for the purpose of—you have no use for a barn except to keep your beer wagons and horses that you haul beer with?

A. That is all.

Q. You keep them for the purpose of hauling beer over here?

A. I keep the horses here because it is handier to keep them on this side.

Q. The only purpose you have for these horses is to use them in this beer delivery?

A. Yes, sir.

Q. You get that beer in Missouri and have to bring it over in your wagons, and with your horses and deliver it in Kansas; that is right, is it not?

A. Yes, sir. (Rec. 151-153.)

Q. Prior to the appointment of these receivers you were in business here?

A. Yes, sir.

Q. And the only purpose you had in moving from here to Stillings was on account of the excitement and the way they were going after them for selling liquor?

A. No, it was on account of the law. (Rec. 154.)

Q. As a matter of fact, at that time you had a lot of customers?

A. Yes, sir.

Q. And on account of the enforcement of the prohibitory law you moved across the river?

A. They told me I had to move. (Rec. 155.)

Q. How much of your mail would you say you get over here?

A. I do not get but very little mail.

Q. You get orders for beer over here?

A. No, sir.

Q. None of them?

A. Oh, they might send in one once in a while and I would send it back just as I stated this morning, if I think it is a beer order. I can always tell; there is only a few towns I get them from; I cross it off and address it to Stillings.

19 Q. Why is it you take out of your box a letter which you think contains a beer order and send it to yourself at Stillings and not open it here?

A. I might take it over myself.

Q. Why do you not open it?

A. Because it is against the law. (Rec. 156.)

Q. Your purpose in carrying it back—your purpose in putting it back in the post office and carrying it to Stillings is to keep from violating the law?

A. They aren't very few of those.

Q. Read the question. [Question read.] Is that the purpose?

A. Yes, sir. (Rec. 156.)

The court received in evidence, at the instance of The State of Kansas, a bill of lading, showing a shipment of beer from the defendant to one John Killian, of Topeka, Kan., on September 28, 1910, dated "Leavenworth, Kansas." The shipment consisted of one cask of beer, weighing 250 lbs. (Rec. 157, 158.)

Q. When you are called up over the phone at Stillings, what would be the ordinary way in which an order was made? Just relate what is said by various parties ordinarily. Give us a sample of an order.

A. They would want a case of beer.

Q. Well, what would they say?

A. Want to know if I would not deliver them a case of beer.

Q. And what would you tell them?

A. I would say "all right."

Q. Now, this beer from which these orders were filled, how was it kept—all in one mass?

A. It was all piled up in a pile.

Q. And when you go to fill the various orders you pick up the cases and have them labeled with the names of the party to whom you want them to go, and then the drivers take them to the various parties; is that right?

A. Yes sir. (Rec. 158, 159.)

Witnesses, Ed Dicks, Martin Ehart, Henry Werner, Ben Samuels and John Welch, all residents of Leavenworth, testified that they had ordered beer from the defendant, at Stillings, by telephone, at different times during the last two or three years; that the defendant delivered the beer at their residences in his own wagons and that they thereafter paid him for it in Leavenworth.

Henry W. Sully testified that he had been a driver for Kirmeyer for two years. That he lived in Leavenworth. That he went to the stable at No. 117 Delaware street every morning, hitched
20 up his team and then drove over to Stillings. That he then loaded up his orders. That he made one or two trips a day. Sometimes he made three trips a day. That he sometimes delivered after night. That he delivers the beer in Leavenworth, at private houses. That he has never hauled beer to any place except Leavenworth. That he delivers the cases of beer in the houses or cellars. That he collects for Kirmeyer when he sends him out with a bill. That he goes around and takes up the "empties" in Leavenworth. That he puts the "empties" in a car down in the railroad yards in Leavenworth. (Rec. 106-115.)

John O'Herron testified that he lives in Leavenworth and that he had been a driver for Kirmeyer for over two years. That he went to the stable in Leavenworth every morning, hitched up his team and then drove over to Stillings. That he hauls only Rochester beer. That he hauled beer from Stillings to the freight depots in Leavenworth, also to residences. That when he hauls beer to the freight depots he puts it on the platform and takes a way bill for it. That he takes the way bill over the river to Kirmeyer. That he has gone to the Missouri Pacific freight depot and there loaded beer on his wagon. That he then hauled this beer over to Stillings, Mo. That he also takes up "empties." (Rec. 116-124.) That he loads them in a freight car in the yards in Leavenworth.

The defendant offered no testimony, but requested the court to make findings of fact and conclusions of law. The case was there-

after argued, and on July 15, 1912, the court made and filed the following findings of fact and conclusions of law:

Findings of Fact.

1. The defendant, M. Kirmeyer, is now, and at all of the times herewithafter mentioned has been, a citizen and resident of the city of Leavenworth, in the state of Kansas, and has been a dealer in beer and malt liquors as hereinafter stated.

2. That about 1907, and prior to moving his office and place of business to the town of Stillings, in the state of Missouri, which is located about one and a half miles east of the city of Leavenworth, Kansas, the defendant had a place of business, warehouse and barn and kept his teams and wagons and beer for sale and delivery at Eighth and Cherokee streets, in the city of Leavenworth, Kansas, and had both telephones numbered 313 at said location, which telephones were connected with the central exchanges in the city of Leavenworth, Kansas.

3. That about three years prior to the institution of this action the defendant moved his place of business from the city of Leavenworth, Kansas, to said town of Stillings, in Platte county, Missouri, where he has ever since kept and maintained an office and warehouse, at which point he receives beer in car-load lots and stores it in said warehouse in the town of Stillings, Missouri, for sale and delivery.

4. The defendant pays the revenue tax required by the general government for those engaged in such business in Platte county, Missouri, and also pays a merchant's tax to Platte county in said state for the privilege of carrying on said business in Platte county, and also pays the general taxes on the value of his property, including beer in his warehouse located in Stillings, Missouri. The defendant has no malt or liquor dealer's license of any kind to sell liquor in the state of Kansas.

5. The defendant has both telephones at his office in Stillings, Missouri, which are connected with both central telephone exchanges in Leavenworth city, Kansas, and he receives and accepts, at his place of business in Stillings, Missouri, orders by telephone and by mail from persons in Kansas, Oklahoma, Missouri and other states, for beer.

6. Any person desiring to purchase beer from the defendant transmits his order to the defendant at his place of business in Stillings, Missouri, by mail or telephone as aforesaid, which order, if accepted, is filled by selecting from his stock of beer in his warehouse, and setting aside the beer in kegs, cases, casks or barrels ordered, on which is placed a shipping tag or label, containing the name of the person to whom and the place where the same is to be delivered, and delivery is made to the person at the place named in said tag or label, in the original packages in which the orders are placed, either by deliverymen engaged in such business or by employees of the defendant with teams and conveyances owned or employed by the defendant for that purpose. No orders are received or accepted by the defendant within the state of Kansas.

7. Those engaged in making such delivery to purchasers in Kansas do not collect from the purchaser at the time of making such delivery; neither do they make sales or solicit orders. Sometimes the purchaser remits the price of the beer by mail after it has been delivered. The defendant himself collects from the most of his customers periodically, at such times as he can get around to them, and sometimes the defendant employs a collector. Occasionally when beer is being delivered by him in the outskirts of the city of Leavenworth and an account is owing to him from some persons in the vicinity in which the delivery is being made, he sends a statement or bill by the driver, who on such occasion sometimes collects where it is inconvenient for the defendant or his collector to go. Such collections, however, are for orders previously delivered, and are not what is known as "C. O. D." shipments.

22 The defendant does what is known as a family trade, and sells and delivers his goods only to private families for private use.

8. At the time the defendant moved his place of business and warehouse to Stillings, Missouri, he removed his teams and wagons used in his said business to No. 117 Delaware street, in the city of Leavenworth, Kansas, where he caused to be reinstalled his two telephones numbered 313, and has since kept at said location said telephone No. 313, his wagons and teams at night and at such other times as they were not in use.

Occasionally, when defendant is at said stables, and any person wanting beer happens to call up at that number, he does not receive or accept their order there, but directs them to call up his place of business in Stillings, Missouri.

9. The only railroads that run through or near the town of Stillings, Missouri, are the Burlington, the Chicago, Rock Island and Pacific, and the Chicago Great Western railroads, which, however, have a freight depot but no regular station agent there, although the Burlington has in some instances received shipments of beer at that point from the defendant, to be delivered in the state of Kansas or elsewhere. The beer purchased by the defendant from the Rochester Brewing Company, of Kansas City, Missouri, for his business at Stillings, Missouri, is delivered to him at Stillings, Missouri, by the railroad in carload lots. Except in a few instances it is shipped to him over the Missouri Pacific Railway Company, consigned to Leavenworth, Kansas, and is there received by him from the railroad company and carried by him to his place of business in Stillings, Missouri, and unloaded into his warehouse. Most, if not all, of the beer so received by the defendant at Leavenworth, Kansas, is for defendant's Platte county, Missouri, trade. How often these shipments are made or just when they have been made is not shown by the evidence.

10. Sometimes, when orders are received from points in Kansas or other states by the defendant at his place of business in Stillings, Missouri, and shipments can not be made by a common carrier directly from the latter point, the defendant places the name and address of the consignee upon the cases, cask or keg at his place of business in Stillings, Missouri, and loads the same upon one of his

wagons and delivers it to the depot of some common carrier in the city of Leavenworth, Kansas, which has a line of railroad reaching the point from which the order is received; a bill of lading is signed and delivered by the agent of the railroad company to the driver or employee of the defendant in Leavenworth, Kansas, and the case, cask or keg is transported by the railroad company to the station designated on the label or shipping tag on said case, cask or keg, to be delivered to consignee named on said tag or label.

23 11. Ever since the defendant has been in said business he has carried an advertisement in a small weekly newspaper published and of limited circulation in the city of Leavenworth, Kansas. This advertisement in said paper under date of May 31, 1912, which was introduced in evidence, reads as follows:

MICHAEL KIRMEYER

STILLINGS, MISSOURI.

ROCHESTER BEER.

Family Trade Especially

Phones 313.

At the time the defendant moved his place of business to Stillings, Missouri, he through oversight failed to have the telephone numbers changed, and said advertisement has ever since run in said newspaper as given above.

A similar advertisement was also carried by him in another weekly newspaper, published and of limited circulation in the city of Leavenworth, Kansas, called the German Tribune.

No orders for beer are or have been received or accepted by the defendant at either of the telephones numbered 313 noted in said advertisement, since moving his warehouse and place of business to Stillings, Mo.

12. Occasionally mail orders have been addressed to the defendant at Leavenworth, Kansas, instead of Stillings, Missouri, but when received by him have been remailed or have been taken or sent to his place of business at Stillings, Missouri, before being opened or accepted.

13. In instances where orders for beer have been received and accepted by the defendant at his place of business at Stillings, Missouri, and the cases are there set aside and tagged or labeled with the name and address of the consignee, and thus delivered by the defendant in his own conveyance or by common carrier, in the city of Leavenworth, Kansas, the empty cases and bottles are charged to the purchaser, and are afterwards gathered up by the defendant with his own teams and wagons and loaded into a freight car placed for that purpose in the freight yards in the city of Leavenworth, Kansas, and then shipped out of the state. When cases are thus gathered up the purchaser is given credit therefor.

14. No reason has been given in the evidence why the defendant maintains a stable at No. 117 Delaware street, in the city of Leaven-

worth, Kansas, and keeps his wagons and teams thereat, nor why he continues to live in the city of Leavenworth, Kansas, instead of the state of Missouri, but from all of the evidence it appears that such horses and vehicles are kept by the defendant in the city of Leavenworth, Kansas, because he himself, by preference, lives here, and it is more convenient for him to stable his teams and wagons on the Kansas side of the river.

24 15. The defendant's residence in the city of Leavenworth, Kansas, and the keeping by him of his teams and wagons used by him in his said business, in said city, is not intended as a subterfuge or a shift or device on his part to circumvent or defeat the prohibitory laws of the state of Kansas. Neither is the fact that mail is occasionally addressed to him at Leavenworth, Kansas, instead of Stillings, Missouri, nor the fact that he maintains telephones at his stables in the city of Leavenworth, Kansas, and advertises in said papers above mentioned, intended by him as a shift, and none of these circumstances actually tend to circumvent or defeat the laws of the state of Kansas.

16. About eighty-five per cent of the orders received by the defendant at his place of business in Stillings, Missouri, from persons in the city of Leavenworth, Kansas, are received over his telephone at Stillings, Missouri, connected with the central exchanges in Leavenworth, Kansas.

17. A railroad and wagon bridge spans the Missouri river at the city of Leavenworth, Kansas, and about a mile from the town of Stillings, Missouri. The defendant, in making said deliveries from his place of business in Stillings, Missouri, to persons and to railroad depots in the city of Leavenworth, Kansas, crosses this bridge and pays the regular tolls charged by the bridge company for permission to cross said bridge.

18. That at the time of the institution of this action, and for the two or three years prior thereto, said defendant did, and still does, in delivering said beer from his place of business, Stillings, Missouri, to his customers and to railroad depots in the city of Leavenworth, Kansas, by means of his said teams, wagons and drivers, drives his teams and wagons along and over the public streets and alleys of the city of Leavenworth, Kansas, and allows and permits his teams and wagons to stand and remain on said public streets and alleys while the beer is taken from the wagons and delivered on the premises of the persons named on the tag or label on case, cask or keg containing the beer, but no delivery is made in any of the public streets or alleys to any person or persons therein.

19. That if judgment is rendered for the plaintiff herein a reasonable attorney's fee for the attorneys of the plaintiff is \$100.

25

Conclusions of Law.

1. That the sale and delivery of beer by the defendant to persons in the state of Kansas and other states, in the manner stated in the findings of fact above, constitutes and is interstate commerce, and is within the scope and protection of section 8 of article 1 of the constitution of the United States.

2. Judgment should be entered for the defendant for his costs.

Thereafter, and on July 18, 1912, The State filed its motion, which, omitting the caption, was as follows:

The State of Kansas respectfully moves the above-entitled court as follows:

First. That the third finding of fact be modified, in accordance with the admission of the defendant in his testimony, so as to show that said defendant moved his business across the Missouri river to Stillings, Missouri, at the time certain receivers were appointed by the supreme court of Kansas to take charge of certain property owned and maintained by certain brewing interests in the state of Kansas, because he was afraid said receivers would take charge of his property in the city of Leavenworth, Kansas.

Second. That the sixth finding of fact be modified, in accordance with the evidence, so as to show that all orders for his beer received by him over telephones or otherwise, for delivery within the city and county of Leavenworth, Kansas, are thereafter delivered by him within the city and county of Leavenworth, Kansas, in his own wagons or in conveyances employed by him, save and except that in a few isolated instances purchasers go over to Stillings and get the beer there. That it be further modified so as to show, in accordance with the evidence, that said defendant does not deliver his beer in his own conveyances or conveyances employed by him at any other point save and except said city and county of Leavenworth, Kansas.

Third. That the seventh finding of fact be modified, in accordance with the evidence, so as to show that practically all of the collections for beer made by said defendant or his agents are made within the city and county of Leavenworth, Kansas.

Fourth. That the ninth finding of fact be modified, in accordance with the evidence, so as to show that the only instance in which the C. B. & Q. Railroad Company, or any other common carrier, ever transported any beer from Stillings, Missouri, to the city or
26 county of Leavenworth, Kansas, for said defendant, was during a flood that cut off his wagon trade with said city and county of Leavenworth, Kansas.

Fifth. That the tenth finding of fact be modified, in accordance with the evidence, so as to show that in all cases where said defendant can not deliver shipments of his beer to a common carrier at Stillings, Missouri, because of the fact that there is no freight agent there, he hauls it in his own conveyances to freight depots in the city of Leavenworth, Kansas, before delivering it to a common carrier.

Sixth. That the eleventh finding of fact be modified, in accordance with the evidence, so as to show that "Phones 313," contained in the advertisement therein set out, is the number of both of the local telephones maintained by the defendant at his stables at No. 117 Delaware street, Leavenworth, Kansas.

Seventh. That the twelfth finding of fact be modified, in accordance with the admission of the defendant that he did not open his mail orders for beer while in Kansas, because he believed that would be violating the law of Kansas

Eighth. That the thirteenth finding of fact be modified, in accordance with the evidence, by excluding therefrom the words "or by common carrier."

Ninth. That the fifteenth finding of fact be modified, in accordance with the evidence, so as to show that all of the matters and things therein mentioned are directly connected with the business of said defendant in selling and delivering his beer within the state of Kansas, in violation of law, and that the whole manner or method of conducting the business of said defendant, as shown by his admission and other evidence, is but a shift, device and subterfuge on his part to evade and violate the prohibitory laws of the state of Kansas.

Tenth. That the nineteenth finding of fact be modified so as to show that a reasonable attorney's fee for the attorneys for the plaintiff in this action is the sum of \$500, in view of the importance of the litigation.

On the same day The State also filed its motion, which, omitting the caption, was as follows:

"Now comes the plaintiff and respectfully moves the court to grant it a permanent injunction, as prayed for in its amended petition, upon the testimony and evidence introduced in its behalf at the trial of this cause."

On July 20, 1912, both of said motions came on for hearing before the court, the result of said hearing being shown by the journal entry thereof, which is as follows:

"On this 20th day of July, A. D. 1912, came the parties hereto, and thereupon came on for hearing the motion of the plaintiff to modify certain findings of fact, heretofore made by the court in this cause, in the particulars set forth in said motion, and the court having heard the arguments of counsel thereon and being well advised in the premises, sustained the third paragraph of said motion to the extent of inserting the words 'in the city of Leavenworth, Kansas,' between the words 'customers' and 'periodically' in the seventh finding of fact; and overruled said motion as to the first, second, fourth, fifth, sixth, seventh, eighth, ninth and tenth paragraphs thereof. To which ruling and decision of the court in modifying said seventh finding the defendant duly objected and excepted, and to which ruling and decision of the court in overruling the first, second, fourth, fifth, sixth, seventh, eighth, ninth and tenth paragraphs of said motion the plaintiff duly objected and excepted.

"Thereupon the motion of the plaintiff for judgment in its favor, and to grant it a permanent injunction as prayed for in its amended petition, upon the testimony and evidence introduced in this cause, came on for hearing, and the court having heard the arguments of counsel thereon and being well advised in the premises, overruled said motion, to which ruling and decision of the court the plaintiff duly objected and excepted.

"It is therefore, now by the court considered, ordered and adjudged that the defendant have and recover of and from the plain-

tiff the costs of this action, taxed at \$—, to which judgment the plaintiff duly objected and excepted.

On July 20, 1912, The State filed a motion for a new trial, which omitting the caption, was as follows:

"Now comes The State of Kansas and respectfully moves the above-entitled court to grant it a new trial for the following reasons, substantially affecting its rights herein:

"First. Because of abuse of discretion of the court.

"Second. Erroneous rulings of the court.

"Third. That the decision of the court was given under the influence of passion or prejudice.

"Fourth. That the decision and judgment of the court is wholly contrary to the evidence.

"Fifth. That the findings of fact, as handed down by the court in this case, are erroneous and not in accordance with the admission of the defendant or the evidence introduced by the plaintiff herein.

"Sixth. That the conclusions of law, as made by the court, are erroneous.

"Seventh. That upon the evidence introduced at the trial of this cause The State of Kansas, plaintiff herein, is entitled to a judgment permanently enjoining the defendant as prayed for in its amended petition in this case."

This motion, upon argument, was overruled by the trial court on July 27, 1912, The State duly objecting and excepting.

Notice of appeal was served upon the defendant in due time.

28

Specifications of Error.

First. The trial court erred in not sustaining the motion for The State to require the defendant to make his answer to the amended petition more definite and certain.

Second. The trial court erred in refusing to sustain the motion of The State to modify its certain findings of facts in accordance with its motion.

Third. The trial court erred in making its conclusions of law.

Fourth. The trial court erred in refusing to sustain the motion of The State for judgment in its behalf as requested in its motion and in rendering judgment for the defendant.

Fifth. The trial court erred in not sustaining the motion of The State for a new trial.

The appellant hereby certifies that the above and foregoing is a true and accurate abstract of so much and such parts of the pleadings, record, evidence and proceedings in the case as it deems necessary for the consideration of the supreme court of the state of Kansas.

JOHN S. DAWSON,

Attorney General of the State of Kansas,

S. M. BREWSTER,

Assistant Attorney General,

LEE BOND,

County Attorney of Leavenworth County Kansas,

ARTHUR M. JACKSON,

Attorneys for Appellant.

29 And afterwards, on the 12th day of November, 1912, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, a Counter Abstract of the Record prepared by the Appellee, which Counter Abstract is in the words and figures as follows, to-wit:

30 Filed Nov. 12, 1912. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court of the State of Kansas.

No. 18393.

THE STATE OF KANSAS, Appellant,

vs.

M. KIRMEYER, Appellee.

Appellee's Counter-abstract of Record of Testimony.

A. E. Dempsey and F. P. Fitzwilliam, Attorneys for Appellee.

31 In the Supreme Court of the State of Kansas.

No. —.

THE STATE OF KANSAS, Appellant,

vs.

M. KIRMEYER, Appellee.

Appellee begs leave to present this counter-abstract of the testimony given by the witnesses in this case, for the reason that he deems the abstract of the appellant to be incorrect and insufficient. While not meaning to challenge the good faith of the counsel for the State, it is evident that in their zeal to win they have omitted much of the material testimony in the case. They have also, in attempting to abstract the testimony, injected their own conclusions of fact and law in such a manner as to color the testimony to the prejudice of the appellee. Neither is the testimony given in the proper chronological order, and the pagings of the record therein referred to are so infrequent and in some instances so inaccurate as to make it impracticable in this counter-abstract to call attention to each of these shortcomings. It is therefore deemed necessary on behalf of the appellee to challenge the correctness of the abstract, and to submit a counter-abstract containing the material parts of the testimony as given at the hearing. Wherever conflict occurs between the abstract and the counter-abstract we respectfully invite the attention of the Court to the record itself to determine which is correct.

Counter-abstract of the Testimony.

M. KIRMEYER, being called on behalf of the State, testified as follows:

Direct examination by Mr. JACKSON:

My name is Mike Kirmeyer. I reside at 702 North Third street in the city of Leavenworth, Kansas. I have been living here thirty years. My business is the beer business at Stillings, Missouri. Stillings, Missouri, is about a mile from the east line of Leavenworth city. There is a bridge across the Missouri river at Leavenworth, connecting Leavenworth with Stillings, and a wagon road connecting the east end of the bridge with Stillings. Stillings is about a mile from the east line of the Missouri river. I think that Stillings is about a mile and a quarter from the city of Leavenworth. I have been in the liquor business over there ever since those receivers were at Leavenworth. It is about four or five years ago. I was in the liquor business before I moved across the river. I have been in the liquor business since I was old enough. I was in the liquor business before I moved across the river; at one time at Second and Kiowa streets; at another on Shawnee between Fourth and Fifth streets; and then on Eighth and Cherokee streets. I received my liquors here in Leavenworth before I moved across the river. Since I have been located in Stillings, Missouri, I have been receiving the liquors there, they being billed to me at Stillings. There
34 is a freight depot at Stillings. I do not know what road maintains the freight depot and there is no agent there. I receive liquor there in Stillings in carload lots. I handle Rochester beer. Not all of the Rochester beer that I receive at Stillings comes in carload lots; that is, not always. All that I get over at Stillings comes in carload lots. I may have handled other beer than the Rochester beer; that is, when I ran short. I handle no other liquor other than beer. This beer is inclosed in regular beer cases. I receive beer there in barrels; also in kegs. I receive beer there in cases of different sizes. The cars are billed to me at Stillings, Missouri. The cars go to Stillings. Some of them go on the Burlington and some on the Chicago Great Western. I get beer over the Missouri Pacific in carload lots from Kansas City, Missouri. Those on the Missouri Pacific pass through Leavenworth. I take charge of the beer that comes over the Missouri Pacific at Leavenworth, at the Missouri Pacific depot. It is unloaded at the freight depot in Leavenworth. I come over with my wagons and haul it to my warehouse in Stillings, Missouri. My warehouse is at Stillings, Missouri. I do not deliver any beer from the Missouri Pacific freight depot to customers in Leavenworth. I take the beer across the river. We do not bring it all back here. We are liable to sell it somewhere else. Some is brought back here and some of it shipped. Most of it goes to Platte City, Missouri. I do not ship beer out of Leavenworth to other parties in Kansas. I do deliver beer from Stillings, Missouri, in wagons to the freight depot of the Santa Fe road to be

shipped to parties out in Kansas. Yes, I have been doing
35 that ever since I have been at Stillings whenever we get an
order there. I deliver at Leavenworth the beer to the rail-
road company; that is, for instance, we ship some to Oklahoma and
that goes by the Santa Fe. The Santa Fe has no station at Still-
ings. We have to bring it across the river. We do the same way
when we ship to Oskaloosa. Yes, I load the beer that goes to Oska-
loosa here in Leavenworth at the depot. That is the only place to
load it. The beer shipped to Oskaloosa is not received by me in
Leavenworth. We get it in carload lots over at Stillings. Beer
that is shipped to us billed to Leavenworth goes mostly to Platte
City. I sell to two saloons over there. They use a different brand
over in Platte City. At Oskaloosa they use what we call Original
Rochester. I do not remember of having ever received any Original
Rochester beer at the freight depots at Leavenworth, from Kansas
City. It is very seldom that we do that. I receive some of the beer
at Stillings, Missouri, in barrels and kegs. The size of the barrel is
usually a cask of ten dozen pints, or six dozen quarts, or three cases
of pints. There are bottles in these barrels. I get one eighth and
one-sixteenth gallon kegs. The casks have bottles inside of them;
pint and quart bottles. We wait until we get orders and sell it. We
never take those bottles out of the barrel. We never transfer beer
from a barrel to a keg. We just sell it in the original packages as
it comes. We have no bottling shop or anything like that. We
sell it just as we get it. We never sell or deliver beer in Leavenworth
in less than cases. It comes sealed and that is the way we
36 sell it; the cases come sealed. And the beer in kegs comes
with stamps on them. The cases are sealed and also the
casks, and we sell them right in the original packages as they come.
We do not transfer the bottles from one case to another. We always
deliver the beer in the same cases that we receive it in at Stillings.
We do not use old cases which we keep stored over there. We never
have occasion to do that. We have nothing but full cases. As we
haul the (empty) cases out in Leavenworth we store them in a freight
car. We have the car stand there until we get it filled. We go
around and gather up the cases and load the car for return to Kansas
City. Ever since I have been doing business at Stillings, Missouri,
I have had stables and warehouse at 117 and 117½ Delaware street,
Leavenworth, Kansas. I keep all my horses and wagons there, ex-
cept one. That is my private driving conveyance. I keep quite
a few wagons down there. I use three. I have a lot of old wagons
stored there. I suppose there is about six or seven old and new ones.
I have been keeping wagons down there about three years. Before
that I had my stables at Eighth and Cherokee street. Ever since
I have been doing business across the river I have had stables in
Leavenworth. I keep five horses down there. The horses are used
on those wagons. The wagons are mine. I do not keep any horses
or wagons at Stillings. I have both 'phones at my place of business
at Stillings. The number of the Bell 'phone is 54 and the number
of the People's 'phone is 101. I have both 'phones at my stables at

117 Delaware street. The number on both 'phones is 313.
37 I have seven 'phones. The other 'phones are one at my home and one out at the farm. I receive my orders for beer at Stillings, Missouri. I am not there all the time; the orders come by letter and some by 'phone. Some of my mail I get at Leavenworth, personal mail, and some I get at Stillings. There is no post-office at Stillings. They bring the mail every morning; the post-office is a little further down the line there, but the mail carrier brings it every morning.

Q. Do you receive orders for beer through the mails here at Leavenworth?

A. No.

Q. Never?

A. If they come to Leavenworth we just send them across the river.

Q. You don't receive them here?

A. No; we don't open them up here.

Q. How can you tell whether or not they are orders unless you open them?

A. I can tell.

Q. You open your private mail here?

A. All the time.

Q. Can you distinguish between an order for beer in your private mail?

A. Yes; I only get orders from Kansas.

Q. Who takes the mail over there?

A. Lots of times I send them over myself.

Q. Without opening?

A. I mean I will cross out the word "Leavenworth" and drop it back in the postoffice.

Q. That is the way you do?

A. When I am over there——

Q. You receive them in Leavenworth and then take them over there yourself?

A. I didn't say that.

Q. Do you not do that?

A. No, sir.

38 Q. You put them back in the mail?

A. Some of them.

Q. What do you do with the others?

A. Most of them come over there.

Q. What do you do with those you do not drop in the mail?

A. I open up the personal letters.

Q. And if you find it is a beer order you take it over when you go over there?

A. If I find it is a beer order?

Q. Yes.

A. I don't know if I did.

Q. What did you do? You ought to know.

A. What do you mean?

Q. If you find it is a beer order in Leavenworth, where do you fill it?

A. I fill it over there; I don't open it here.

Q. You fill it after you get over there?

A. Yes, sir.

Q. What per cent of your orders for beer from Leavenworth, Kansas, do you receive by mail?

A. Well, we do not get but about 15 per cent.

Q. You think about 15 per cent from Leavenworth?

A. Yes, sir.

Q. Then 85 per cent from Leavenworth are telephone orders?

A. Yes, sir.

I do not know whether the Bell or Home phones are connected with my phones or not. When we call up we get central in Leavenworth, and when we call for a number Leavenworth central gives us the number. If we call up my place at Stillings we call for Stillings and they give us my number, either 54 or 101. I pay no toll for talking to Stillings, Missouri, except such as I pay each month. I guess that 'phones number 313 are connected with the Leavenworth exchange.

39 Q. Now, Mr. Kirmeyer, you receive orders for beer at 117 Delaware street, do you not?

A. Why, once in awhile. We tell them to call up the other number.

A. Suppose a customer call you—are you ever around 117 Delaware street?

A. I go down there once in awhile to see the boys.

Q. Suppose a customer calls up 313 and tells you he wants you to send him a case of beer, do you take the orders there?

A. If I am there I tell them they have got to call up another number over there.

I do not remember of advertising in the Leavenworth newspaper. I carry an ad. in the newspaper know as the Labor Chronicle or Re-submissionist. That is my ad. in that paper of May 31, 1912, on the second page. I have been carrying that ad. ever since I have been in town. I had that when I was over on Eighth and Cherokee streets.

Advertisement is here offered in evidence as Exhibit "A," and is as follows:

MICHAEL KIRMEYER
Stillings, Mo.
ROCHESTER
BEER
Family Trade Especially
'Phones 313

Phones 313 mentioned in this advertisement is the number of both of my phones at 117 Delaware street.

40 Q. Now, state to the court just how you deliver liquors from Stillings, Mo., in the city of Leavenworth?

A. Why, to the city of Leavenworth alone?

Q. Within the city of Leavenworth.

A. Why, we have hauled some over in wagons; some come and got it themselves, and we have taken some over in a freight car.

Q. You employ your own wagons and teams in delivering liquors from Stillings, Mo., within the city of Leavenworth?

A. Yes, sir.

Q. And have ever since you have been located at Stillings?

A. Not altogether; I have hired wagons. I hire them to deliver once in awhile when a driver lays off or some people want it with a common carrier. I do not pay for the carriage when they get it that way. When I hire wagons to deliver I pay them. My teams usually haul beer across the river once a day, about 11 o'clock in the morning.

We never send a wagon load. We never get that many orders. We do not get enough to fill wagons lately, not in the last year or two. We do not send wagons over loaded with liquor and let them remain in my stable over night; I never do that. If anybody orders in the morning we send a special wagon; and when orders in the evening are a little bit late we deliver them in the morning. We do not bring over anything and keep it here at night.

Q. Suppose a customer in Leavenworth telephones you for one case of beer, say, this morning, do you bring the order immediately, or do you wait until you have several orders?

41 A. It depends on how many orders we have on hand. If they are in a rush we once in awhile accommodate them.

Q. If they have to have it?

A. I mean if the people say they would like to have it.

Q. But your usual custom is to wait until the afternoon when the orders accumulate and you can bring over quite a load—is that not a fact?

A. Yes, sir.

Sometimes I make a transportation charge for the liquor that I deliver in Leavenworth and sometimes I do not. It depends on the amount they buy and who it is.

Q. Suppose I call you up for a case of beer and you would bring it to my residence, would you charge me for making the delivery?

A. I would charge you 10 cents.

Q. Ten cents—do you do that in many cases?

A. It depends a good deal on the charges coming over, and when they want it, and one thing and another.

Q. Can you mention any one case where you charge a customer 10 cents for delivering a case of beer to him?

A. Yes, sir.

Q. Who were they?

A. I could not mention them now.

Q. Can you mention a single case you have charged 10 cents for delivering beer to them?

A. No, I don't think I could just now.

My drivers are not supposed, when they go around the city, to

take orders for beer. They do not do that as far as I know. I have never known a case of that kind. They are supposed to deliver what the customers order across the river. No, they do not come across the river and say so and so want so many cases of beer for tomorrow. The drivers do not have instructions to tell the customers when they want to order beer to call up Stillings, Missouri. They are supposed to know that. I tell them not to take orders. No, I have no sign out in front of my stables at 117 Delaware street with "Leave Orders Here" on it. No, I do not have such a sign. It says "Leave Bills Here," not orders. My customers leave bills there on the first of the month. I mean bills, such bills that I owe around town. The sign says: "Leave Bills Here or Mail to Stillings." It don't say orders, and the sign is on there today. I collect bills once in awhile, and I have a collector. Sometimes I collect every day; sometimes, from some people, once a month; sometimes once a week; some every two months or so, or when I get around. I collect those bills in town wherever I happen to find the parties. Yes, I collect them here in Leavenworth. I either bring bills to my regular customers or mail it to them. Half of them I mail them to, and they mail me a check.

Q. Where do they mail you that check, to what address?

A. Sometimes they mail it to me here, sometimes mail it to Stillings; most of the time I collect it.

Q. Do your drivers ever collect bills for you?

A. I send them out with a few sometimes when they are away out in the outskirts.

Q. They do collect those bills and bring the money to you?

A. Why, yes, if I ask them.

Q. Do they ever collect from any of your customers when they deliver the liquor?

A. No, sir.

43 If I have a customer that I don't care to give credit I would have nothing to do with him unless he sent the money. Sometimes they bring the money over there. They never bring it to me here in Leavenworth; I do not accept it. I do not accept money only for a statement.

Q. You testified a minute ago that these customers you didn't care to give credit that they sent the money across the river and that you didn't collect it here; that you would not take it here in the city of Leavenworth. Why would you not?

A. Why I don't accept money.

Q. Why in Leavenworth?

A. Why, it is against the law.

Q. What does your business amount to here in Leavenworth every month?

A. Seven or eight hundred dollars a week.

Q. Seven or eight hundred dollars a week?

A. You know that is the "empties" in; that they charge for the empty ones.

I mean a man really don't do that much business. They charge

for the empties, and when the empties are returned they receive credit for them. My actual sales in Leavenworth a week would amount to four or five hundred dollars.

Q. Do you handle any other beer except Rochester beer?

A. No, sir.

Q. Do you deliver your own beer or do you deliver for other parties?

A. Well, now, that is the only kind I have. Of course, I don't know what the drivers might do; they might deliver a case for some other agent as an accommodation, but I don't know that to be a fact.

I am not an agent of the Rochester Company; I am a
44 dealer and buy and sell. Those goods are consigned to me at Stillings. I am a dealer there. I buy the goods outright.

Q. It is your intention, I infer from what you say, to deliver only your own liquors?

A. Why, yes, sir.

Q. Mr. Kirmeyer, you take up empties around the city?

— The drivers do.

Q. You load those on the cars at Leavenworth?

A. I load them here.

I have no particular day to load empties. The drivers, as they go around and see a place where they think there is a case of empties get them and take them to the car. I have a car there on the track, and pay demurrage. The car is in the Great Western yard, around West Seventh street, in Leavenworth.

Q. Now, when your drivers go around to take up these empties, they sometimes collect from customers, don't they?

A. Why, they do if I give them a bill, a statement.

Q. And how often do you give them a bill to collect when they take up the empties?

A. Oh, I could not say; it depends on what locality they are going to and who the customers are. Most of the people I collect from.

Q. What class of customers do you give the bills to the drivers to collect?

A. Those people that I don't get out to. They live a little bit on the outskirts. People around town I go to myself or hire a collector.

Some I go to once a week, some every two weeks, some once a month, some every two months. It depends on just what standing they have.

Q. Now, Mr. Kirmeyer, about what per cent of your business here in the city—liquor business in the city—is family
45 trade?

A. About all of it.

Q. About all of it?

A. Yes, sir.

Q. Your wagons—drivers go out to the residences and deliver the cases at the residences, do they not?

A. Why, yes, where they are sent to; I don't know where they deliver them.

Q. Now, do you say 95 per cent is residence or family trade in this city?

A. I suppose it is all family trade.

Q. Well, you have a little bit around other places?

A. Not me.

Q. Not you—it is all family trade?

A. Mine is.

Q. Do they (your drivers) use the streets and alleys of Leavenworth?

A. I suppose they do.

Q. And no matter where the order is from in the city of Leavenworth, your drivers and wagons go to the residences, do they not?

A. Yes, if there is any there.

Q. How many towns in Kansas, Mr. Kirmeyer, do you ship liquors to from Leavenworth, Kansas?

A. Oh, I suppose about fifteen or twenty, I guess.

Q. Name them, as many as you can?

A. Well, all along out on this Kansas Central.

Q. Meaning the L., K. & W.?

A. Yes, sir.

Q. Well, name some of the towns?

A. Well, there is Easton, Winchester, Onaga, Garrison, Lawrence—I have not shipped any to Lawrence for awhile.

Q. Go on.

A. That is about all; I have not kept the books lately.

Q. Do you ship to Topeka?

A. Not for a long while.

46 Q. Well, how long?

A. About a year and a half.

I do not know whether I was shipping there at the time this suit was instituted or not. I was not taking care of the books. I was working mostly in Kansas City. I ship to Boling, Ashland and Tonganoxie. I use the railroad to these different points. I suppose they are billed out from Leavenworth in each case to these different towns. I do not make shipments to Yates Center. I do not remember of ever shipping anything there. I do not know F. R. Watson. I do not remember of shipping any beer on August 6, 1910, to him. I do not remember the party at all. I would not say I did not; I don't know. There is a lot of those cases—once in awhile we will get a letter over there—I suppose they put it down in a different name. I am not shipping to Topeka. It is about a couple of years since I shipped there. The reason I quit shipping to Topeka is because they quit ordering. I only had one customer there. I forget his name. I think it was a butcher. I do not know Mrs. Guam. I think John Killion is the butcher. It has been a couple of years since I shipped him. I do not remember of shipping a cask of beer on September 13, 1910, to him over the Santa Fe. I said he got a cask once in awhile. I may have shipped him another cask of beer on September 28, 1910, over the Santa Fe. I do not know Mr. Birdman of Topeka. I do not remember shipping him a cask of beer on September 10, 1910, over the Santa Fe. I do not know a party at Scipio, Kan., by the name of Luke Lamen-

ger. I could not say whether I shipped him any beer on
47 September 1, 1910, over the Santa Fe or not. I do not know
Mrs. Guam. If she ordered a cask of beer on August 13,
1910, and sent the money I would sure have shipped it to her at
Topeka over the Santa Fe. No, I do not have a bunch of customers
at Oskaloosa; I have about two or three. I believe that Mr. Loh-
man is not now a customer of mine. Bert Patrick gets a case of
me once in awhile. Yes, off and on he has been doing this for
three or four years. I could not say whether I shipped him three
cases of beer on August 8, 1910, over the Santa Fe from Leaven-
worth to Oskaloosa or not. I have not for a long while shipped
to C. L. Dockhorn. I shipped him stuff before. The last ship-
ment to him, I think, was about a couple of years. I do not remem-
ber of shipping him on August 8, 1910, three cases of beer from
Leavenworth. I do not know Ira Danner of Oskaloosa. I do not
know whether I shipped him beer over the Santa Fe from Leaven-
worth August 6, 1910, or not. I do not know H. H. Fenney of
Oskaloosa. I do not know whether I had a customer by that name
in August, 1910, to whom I shipped two cases of beer. I never
heard of him. I do not know William Sutton of Oskaloosa. No,
I did not ship him two cases of beer August 1, 1910, over the Santa
Fe. I know F. P. Insley. I have not shipped him for a long
while that I remember—they all kind of quit. I may have. I do
not remember that I shipped him two cases of beer on August 6,
1910. I do not know J. Robinson of Oskaloosa. If they order
beer across the river, and send the money, why of course it is
48 sent to them. There is lots of times one man orders for
four or five.

Q. You spoke in the early part of your testimony of receivers
being appointed. Do you remember, Mr. Kirmeyer, what court
appointed them?

A. No, I don't.

Q. Was it the Supreme Court of Kansas?

A. I could not say that.

Q. What did these receivers do here, so far as you are concerned?

A. They scared everybody up.

Q. After that you moved across the river?

A. Everybody moved.

Q. You ran several saloons at that time?

A. No; I have not run a saloon in eighteen years.

Q. Well, at the time you moved from Leavenworth to Stillings you
had a large number of customers in Leavenworth, did you not?

A. Why, yes, a few.

Q. Have you got the same customers yet?

A. I don't remember that very well.

Most of the good ones moved out of town. I have more family
trade now. I had some family trade before I moved to Stillings.
I delivered beer at residences.

Q. Delivered beer at residences—what change, if any, has been
made in your method of doing business, so far as the family trade
is concerned, since you went to Stillings?

A. Well, there ain't much difference.

Cross-examination by Mr. DEMPSEY:

I have a government license in Missouri. I pay a government tax. Yes, sir, I pay a tax over there. I call it a revenue
49 tax—revenue license—government revenue license; that is, from the United States Government. I pay what they call a merchant's tax. I pay it to Platte County. I have been paying the revenue taxes and merchant's taxes ever since I have been in Missouri. I have been in business in Stillings, Missouri, four or five years. My wagons have to pay for crossing the bridge when they come from Stillings to Leavenworth, 50 cents.

Q. Now, you said something about occasionally having goods shipped in on the Missouri Pacific and taking them across the river. I will ask you to state if in all cases you take those goods from the freight depot when they are shipped to this point—take them to Stillings, Missouri, before you send them elsewhere?

A. Yes.

Q. Something was asked you about the number of your telephone that is mentioned in your advertisement in the Labor Chronicle—No. 313—and you wanted to make some explanation and counsel didn't seem to permit you. Now, you may make such explanation as you wish to.

A. I took that advertisement, and that is the only one I ever had, when I was on Eighth and Cherokee street; that is, when I came to town; I don't figure it no advertisement.

Q. Is that the number of your 'phone before you went over?

A. That was the only two 'phones I had at that time; they had those two 'phones when I came here.

Q. You mean your predecessor in the business?

A. The man that was here had those two 'phones and I never
50 changed them; they was at the barn over there, and he had that ad. in there and it has never been changed.

The COURT: He didn't have the same Michael Kirmeyer part in there, did he?

A. I didn't know it was in there.

The COURT: Are you still carrying that ad. in there?

A. I didn't know it was in there.

The COURT: Are you not paying for it?

A. Yes, I pay for it—

Q. Now, something has been said here about shipping goods to Easton, Winchester, Onaga, Garrison and other towns in Kansas. I will ask you if in all cases those goods were sent by you from your warehouse in Missouri to the respective stations and sent to the different customers?

Mr. JACKSON: I object to the question as calling for the conclusion of the witness.

Q. Read the question.

(Question read.)

A. What is the question?

Q. I asked whether or not whenever you received an order over at Stillings, Missouri, from any of these towns that have been mentioned, or elsewhere in Kansas, whether or not you send or take the goods directly from your warehouse in Missouri, or send them, if you did send them, to the stations in Leavenworth for the purpose of being shipped to those other towns?

A. Why, yes; everything comes from Stillings, Missouri.

Q. That is what I wanted you to state, if it is a fact?

A. That is the only place we have any warehouse.

Q. Now, I will ask you to state if in all cases those goods
51 were not shipped in pursuance of orders received by you and accepted in the state of Missouri?

A. Yes, sir; they were all accepted in Missouri.

Q. And shipped from the state of Missouri?

A. Yes, sir.

Q. In the matter of the collecting, I understood you to state that no collections were made at the time the goods were delivered. Is that correct—that is, no collections for goods that were delivered at the time—no C. O. D. shipments?

A. No C. O. Ds.

Q. You say you have a regular collector who goes around and collects?

A. Yes, sir.

Q. And you sometimes collect yourself?

A. Mostly.

Q. You spoke about collecting up these empties. I will ask you to state regarding that whether there is a price for the empties as well as a price for the beer that is in the case when it is originally shipped over?

A. Yes, sir, we are supposed to charge so much for the stuff and so much for the empties. We give them the empty if they return them.

Q. You give them credit if they return the empties?

A. Yes, sir.

Redirect examination by Mr. JACKSON:

Q. Mr. Kirmeyer, I wish you would state to the Court what Stillings, Mo., consists of in the way of buildings.

A. It consists mostly—it has a store there, a depot, that is a little
52 roundhouse—there is no depot there—a roundhouse and ten or fifteen residences, I suppose. There is about eight or ten beer houses or liquor warehouses over there strung along. Considerable of my business is from Stillings in Platte county, Missouri. I can name you several customers I have in Platte City, Missouri. One is W. E. Mason, located in Platte City, Missouri. It is about one mile from Stillings, Missouri. Platte City and Stillings are in Platte county. I have no saloons anywhere. I did not state that I had two saloons in Platte City, I said I sold two saloons. This is one of them. The name of the other party is Jasper Bradberg. There is quite a lot of family trade in Platte county, Missouri. I could not just now mention their names. I do not deliver to the

residences in Platte City, I ship it. They come and get it, and haul it on that road home. I do not haul any on my wagons to residences in Platte City. No, all of my wagon trade is not with Leavenworth county. We haul it anywhere it is ordered. Leavenworth is about the only place that I know of that I can haul it with a wagon. I would have to ship too far.

Q. Well, do you?

A. I suppose I do. I could not tell just now unless I looked in my books. I don't keep all that stuff in my head.

Q. Can you give the court the name of a single residence—the name of the owner of a single residence to which you deliver beer in wagons outside of Leavenworth county?

A. Yes, sir.

Q. Name them to whom you deliver in your wagons.

A. Well, I haul some to almost every one there that don't—that is that don't handle beer; that is, take for instance, John
53 Baum, take the storekeeper over there, Mrs. Kaferty—anybody that wants it.

Q. You spoke of a government license. Whereabouts did you take out your government license?

A. Kansas City. It is a wholesale and retail liquor license. It names my place of business as Stillings, Platte county, Missouri. I do not have any government license in Kansas. I do not claim to have any license to do any business in Kansas.

Q. Now, let us get this ad. clear, Mr. Kirmeyer. You testified it has been running in this paper how long time—has there been any change in it the last few years?

A. That ad. was in there when I was sent up here. That was in 1901—and that was the name—we only had those two 'phones at that time, and they, both of them, were 303 over there.

Q. Did you make any changes in the ad.?

A. Not that I know of. I might have changed it when I first came here—had my name put in instead of Anton Trum's. No other changes that I remember. When I first came here I was not doing business in Stilling, Missouri. I was doing business in Eighth and Cherokee streets. Well, they must have made the change themselves. I didn't change it. I think I paid \$1.50 a month for that ad. I could not say what portion of my business is in the shipping of liquor to points in Missouri. No, the shipments to Platte City is not about all I have in the state of Missouri. I ship to Insley, to anybody that wants it. I suppose that my business in Missouri amounts to about four or five hundred dollars a month, that is net.

54 Most of that is shipped direct from Kansas City, but I have charge of it. Those shipments do not usually stop at Stillings. They go through on the Rock Island Railroad. Yes, I get credit for these sales. I take charge of it if it is shipped direct from Kansas City to Platte City. I order it and have it shipped direct. I am not acting as agent for the Rochester Brewing Company. It is charged to me and I collect from the purchasers. I have no written contract with the Rochester Brewing Company. All of these shipments that are received by me at Stillings for liquor are

taken out of the car. It does not matter whether they come in car-load lots or not, they are taken out of the car and the car is released. We hold these shipments there and deliver them on orders as we get them at Stillings, Missouri.

Q. Speaking of this ad. again, you carry an ad. in the German Tribune?

A. Yes, sir.

Q. The same ad.?

A. Yes, sir. I suppose I have been carrying this ad. as long as the other. I do not remember reading the ad. I paid for the ad. in the German Tribune. I do not carry an ad. in the Leavenworth Post. These others are the only two papers I carry an ad. in. They are weekly papers. They are not carried for any benefit I get out of them. I do not remember of ever having an ad. in the Leavenworth Post. I believe that I never had one. I carry an ad., similar to this one in the German Tribune, regularly, and have done so ever since I have been wholesaling beer.

Q. And in that ad. you tell the readers of the paper to call you at No. 313 Main, do you not?

55 A. No, I do not tell them. I keep a ledger account in a small book at Stillings, Missouri. I do not keep a day-book. Just one book I have.

(The court thereupon directs Mr. Kirmeyer to bring such book over in the afternoon, which he does.)

Recross-examination by Mr. DEMPSEY:

Q. Mr. Kirmeyer, do you ship any goods to Nebraska?

A. I have shipped goods to Nebraska.

Q. Do you ship goods to Oklahoma?

A. Yes, sir.

Q. Do you ship goods to the various parts of Missouri whenever you receive orders?

A. Yes, sir.

Q. Now, you spoke about your unloading goods from the cars into your warehouses over in Missouri. I will ask you to state if you have shipped orders from your warehouse to places in Oklahoma, and even into Nebraska from your warehouse?

A. Yes, sir, I have.

Q. Counsel tries to make out here that you only ship and take beer over to Leavenworth county. Do you advertise elsewhere than in these papers?

A. No, I do not; I do not do any advertising at all.

Q. Now, these papers you have spoke of, for instance, the Labor Chronicle, is a paper of quite limited circulation, is it?

A. Why, yes.

Q. And you say you simply carry that more as an accommodation to the paper than as a benefit to yourself?

A. Well, I do not know whether it does me any benefit or not.

Q. The same is true as to the Leavenworth Tribune, you spoke of?

A. Yes.

56 Redirect examination by Mr. JACKSON:

I do not know where these papers circulate. I do not know whether they circulate largely among my customers or not. I am acquainted with J. H. Foley of Guthrie, Oklahoma. I have shipped him liquors from Stillings, Missouri. I have shipped him no liquors from Leavenworth. I shipped him beer on the 16th of September, 1910. I ship him right along. I do not know whether this beer is shipped from Leavenworth or not. I would not say that I did not. Somebody else might. I suppose he has been getting beer right along. I made that way bill marked M. Kirmeyer.

Q. Would you say that you did not load these three cases of beer right here or deliver them right here at the Santa Fe freight house on that day?

A. Why, I ship beer right along. I deliver it to the Santa Fe freight depot. If they order it at Stillings I take and ship it here, because they have no depot in Missouri. I do not deny that I bring it over here in my own wagons. I ship beer to Oklahoma, and in each case I deliver the liquors at the depot here in Leavenworth. That is the only place I can take it if I want to ship it. There is no freight office at Stillings, Missouri. I cannot bill the liquor out from there on any railroad. We ship from Stillings over here on the Burlington, but the Santa Fe has no road running into Stillings. I do not remember how they ship on the Burlington from Stillings, Missouri, to Leavenworth. I do not remember whether we get a way bill or not. We have done that several times. I think they have charged us for the haul. We shipped during the
57 high water. I am not acquainted with J. L. Thorp of La Junta, Colorado. I do not remember of having shipped him liquor to Colorado. I might have. I have not been lately shipping to Colorado.

Q. But in all cases, no matter where the consignment goes by rail, if it is in Kansas, Oklahoma, Colorado or Nebraska, you bring those liquors across the river from Stillings in your own conveyances and deliver them to the freight depots here in the city of Leavenworth, Kansas, do you not?

A. Why, in a good many cases we do.

Q. Don't you do it in all cases?

A. Sometimes they come and get it.

Q. Take shipments at some distance from Leavenworth—when-ever you ship, in all cases you bring the liquor across the river and in your own wagons and deliver it at the freight houses?

A. Yes, sir, that is, orders that I get in Missouri.

Q. Do you keep any record of the written orders?

A. No, sir.

Q. Do you keep the written orders themselves?

A. No, I did not.

Q. What did you do with the written order after you receive one over there?

A. Well, we don't ship them unless the cash accompanies the order; when it is shipped we don't keep track of it.

Q. Is that the practice in Platte county, too?

A. No, we run a monthly account there.

Q. Do you keep these orders that come in from Topeka and Oskaloosa and those places?

A. No, I do not.

Q. Then, I infer that you do nothing but a cash business outside of the city of Leavenworth?

A. No, I do not.

58 Q. Is that a fact, do you do any but a cash business outside of the city of Leavenworth?

A. I do all kinds of business.

Q. How do you do that—do you make any entry on your books—any charges?

A. You mean for beer sent out?

Q. Yes.

A. Yes.

Q. Your books show these charges, do they?

A. Yes, sir.

Q. What do you receive, that is, what does an order consist of—a letter, or is it on a form that you have prepared. In what way are those written orders received?

A. We have forms, and there is some comes in in letters.

Q. Do you have any particular form you send customers at Oskaloosa and other places?

A. We used to, but not much lately, because we do not do much business.

Q. Do you keep any of your correspondence with these customers at Oskaloosa and places like that?

A. No, not much.

Q. Do you keep any of the correspondence?

A. No, I do not file them; I just hang them on a hook and burn them up.

Q. How often do you burn them up?

A. Oh, when we get a few on hand.

Q. When did you burn the last ones?

Q. Well, have you any of those orders there now on those places?

A. I do not know.

Q. When was the last time you burned any of those orders?

A. Why, the men over there usually burns them; I don't.

59 Q. Do you know when the last ones were burned?

A. No. I could not say.

Q. Well, have you directed your men to destroy these orders or burn them?

A. Well, I usually throw them in the waste basket, and I suppose they burn them up every morning.

Q. But, you say a part of your business is a credit business; how do you keep track of that, if you do not keep these orders?

A. Most of that is 'phone orders.

Q. Oh, that is not written orders at all?

A. Some of it is.

Q. How do you keep track of these empties, Mr. Kirmeyer?

Q. Of the empties, yes, where the order might be destroyed?

A. They pay for the empties.

Q. You do not have any written form of order that you use here in the city of Leavenworth for your regular customers?

A. Yes, we have.

Q. Your drivers carry those orders?

A. Why, no, they do not.

Q. They do not—is it a fact that they never have these written orders or slips with them?

A. No, mine have not.

Q. What do you do with those slips where you receive an order on a slip?

A. Why, the slip—what do you mean by slip?

Q. If you use a written form coming from your customer here in Leavenworth?

A. Well, we have not used any in a long while.

Q. Then your business is almost entirely a telephone business?

A. No, not all of it.

60 Q. Well, practically all of it?

A. No, not all of it.

Q. Do you claim that you have stopped using the written or printed form of orders?

A. No, we have some down—that is over there.

Q. Well, if you have received an order of that kind at any time, what did you do with it—on any form or slip?

A. Well, after we get an order of that kind and the case is sent out and the money accompanies the order, we do not pay much attention to it.

Q. Suppose it is not a cash order, do you destroy the slip?

A. Well, there is not anybody gets credit unless he is pretty good, they usually have to send the money with the order.

Q. Suppose their credit is entirely good, and they give you an order on a form or slip, what do you do with the slip then?

A. Well, we keep it a little while, and I suppose it is destroyed like all others.

Q. Do you think that you have any written forms of any kind over there?

A. I may have some.

Q. Would you be willing to bring those over with you?

A. Well, if I can find any, I will.

Q. Bring them along.

(Mr. Kirmeyer brings his ledger with him after the noon adjournment.)

Mr. KIRMEYER is recalled for further direct examination by Mr. Jackson.

I have the ledger with me that you spoke of this morning. I now produce it. (Mr. Kirmeyer produces that ledger that he spoke of

this morning.) This is the only book that I keep. This
61 book shows the names of the people that had bought beer.

I have charged it to them. This book shows the names of my customers in Platte county, Missouri. I can turn in this book and name my customers in Platte county. The page of the book is 41. Referring to pages 40 and 41 I find the account of W. E. Mason of Platte City. At page 44 appears the name of J. Bradberry. Those are not the only customers that I have in Platte county. There are about three other ones that pay cash. No, none of them are in the neighborhood of Stillings, they are all at Platte City. These two men are regular customers of mine, they run a saloon. No, not all of the liquor that goes to these two men are shipped directly from Kansas City, Missouri. Most of it is. No, the beer that I deliver to them at Stillings is not delivered in my own wagons; I ship it to them. I made these entries—my brother did those. They are made from a trip sheet. They are made out every day and posted in the ledger. This book shows my credit customers at Oskaloosa, and at other places in Kansas. On page 49 the account of F. J. Searles appears. He lives at Oskaloosa. Yes, this book shows the account of my Leavenworth customers. There are quite a few. Here is one at Richardson. There is another at Richardson. Any of the customers you see in this book are my credit customers. Here is one from Oskaloosa. I do not keep a cash book. It is all in this, all compact. I do this to shorten bookkeeping. I do not keep any cash account.

Q. When a driver collects a bill here in the city of Leavenworth and brings the money to you, where do you enter it?

A. Right here (indicating)—If he collects a bill it will
62 go over here (indicating).

(This last above matter refers to a trip sheet.)

Q. Mr. Kirmeyer, what is your collector's name?

A. Well, I had my brother all the time until lately; I do it all mostly now. I had a young boy help me out on the first of the month. When my brother collected bills I made the entries right here (indicating). I made out my monthly statements here (indicating). I put my bills on the regular letter bill head.

Q. Now, your brother presented those bills on a regular bill head on the first of the month, and the bill was paid, then how did you make the entries in this ledger?

A. Why, I put it on there on that same sheet, there at night when he came in and settled up.

Q. Each driver has one of these sheets?

A. No, I have those in the office.

Q. You keep these in the office?

A. Yes, sir.

Q. Do you ever give these to the drivers?

A. No, sir.

Q. Simply a memorandum of the order?

A. Of the day's work.

Q. Where do you get your data that you enter on this sheet—

from whom, whatever you enter on this sheet of paper, from what source do you get it?

A. I get it from whoever turns it in to me.

Q. Well, who turns it in?

A. Well, I check up with the drivers. As they go out we charge it on there.

Q. Perhaps I can get it in this way; suppose you received a telephone order for a case of beer, do you enter that on this sheet of paper?

A. Yes, sir.

63 Q. The name of the party to whom it is to be taken?

A. Yes, sir.

Q. And the amount?

A. And if it is credit, there is a credit slip; if it is cash we mark it "cash."

Q. Suppose this order comes in at No. 313, then where is it entered?

A. It is not entered at all.

Mr. DEMPSEY: We object to any unfair attempt to take advantage of this witness. He is trying in good faith to explain, and they are trying to trip him all the time.

Q. I say, suppose an order came at 313?

A. Why, we would not take it.

Mr. KIRMEYER: You spoke of that slip on the door down there. I tore it off. (Handing slip to Mr. Jackson.)

Q. Suppose a telephone order comes at No. 313 Main, what do you do with it?

A. We tell them to call up across the river; that is, I give them orders to do that; I am not always there.

Q. You keep a man there all the time?

A. No, sir, the stable man is there.

Q. He is there all day long?

A. No.

Q. Did you ever receive orders at your residence?

A. At my residence—no.

Q. Do any of your customers ever call you up there and order a case of beer?

A. They call up there once in a while.

Q. Do they ever order beer from you over your home phone?

A. No.

64 Q. Do they ever call you at your residence phone and you tell them to call up Stillings, Missouri?

A. Why, they never call up there.

Mr. JACKSON: I guess that is all.

Cross-examination by Mr. DEMPSEY:

Q. This little slip of paper that you handed to counsel, I will ask you if that is what you referred to in your direct examination this forenoon?

A. That is one of them; there is two of them on there.

Q. Are they both the same?

A. Yes, sir.

Q. This you tore off the door this noon?

A. Yes, sir.

Q. And is that the inscription you tried to give from memory this morning?

A. That is exactly the same thing.

Mr. DEMPSEY: We offer this in evidence and ask the stenographer to mark it.

Mr. JACKSON: I object to it as incompetent, irrelevant and immaterial.

The COURT: Overruled.

(Marked "Defendant's Exhibit No. One.")

Leave Bills below
or
Mail to Stillings, Mo.

Q. Mr. Kirmeyer, this morning you stated about paying a merchant's tax over there. I will ask you if you meant a personal property tax, is that what you were alluding to?

A. No, in Missouri they have a merchant's tax which they
65 charge you for doing what they call a regular merchant's license. They charge you on the amount of business you do, and they give you a regular certificate, or merchant's license.

Q. You have an office there?

A. Yes, sir.

Q. You have a telephone there?

A. Yes, sir.

Q. You have two telephones there?

A. Yes, sir.

Q. Now, in referring to this sheet of paper here in illustrating how you kept your daily records, counsel asked you something about the driver, and you stated "if the driver sells it goes in here," pointing to one column, "and if he collects, it goes in here," do you want to be understood as saying the driver sold and collected?

A. Only what he delivers.

The COURT: Does the state charge you a tax, too—how many taxes do you pay, two or three?

A. Three taxes. I pay personal; I pay merchant's; I pay government, and also state tax—four taxes.

Mr. DEMPSEY: You pay a merchant's tax and a personal property tax?

A. Yes, sir.

Mr. DEMPSEY: Now, personal property tax that you pay is on what kind of property?

A. On the beer.

Mr. DEMPSEY: And kept in your warehouse over there?

A. Yes, sir.

Q. The average amount?

A. They average it up, they come down there and average it up and charge you accordingly. It is the same kind of a tax as a groceryman or anybody pays in Missouri, I suppose. We never paid it on this side. They give you a certificate and a merchant's license.

66 Redirect examination by Mr. JACKSON:

Q. Do you own the real estate over there—your warehouse?

A. Why, I lease it.

Q. You do not own the building?

A. No, I do not, I pay rent.

Q. Referring to Defendant's Exhibit No. One that has been offered in evidence by Mr. Dempsey, the slip of paper off of the door, as you claim, part of it is torn off, Mr. Kirmeyer, do you know what was at the top of it there?

A. It is on the door if it is not there.

Q. Do you know what it was?

A. Well, let me see. (Examines it.) Yes, that is some paper that was sent up from Kansas City.

Q. I mean what are the words that are taken off at the front part?

A. It seems like my name.

Mr. DEMPSEY: "Michael?"

Q. And that reads, "Michael Kirmeyer. Dealer in Celebrated Rochester Beer?"

A. Yes, sir.

Mr. DEMPSEY: That is printed on there?

A. It is printed on there.

Q. "Leave bills." What do you mean by "Leave bills?"

A. That was put there before the first of the month.

Q. What do you mean by below—basement?

A. There is a little hole below in the door.

Q. You have a basement down there have you not?

A. We have a swell basement.

Q. You keep your horses in the basement?

A. Yes, sir.

Mr. JACKSON: That is all.

67 Recross-examination by Mr. DEMPSEY:

Q. This piece of paper is simply an ordinary bill head of yours?

A. I don't know what it is; it must be an old one, I don't recognize it; it is not one we have nowadays; it must be a piece that was picked up around here.

Q. I forgot to ask you in relation to these orders that you get in your place of business in Missouri. In filling those orders, I will ask you to state whether or not you put on each package or each box, as the case may be, the name of the person who gives the order?

A. Yes, sir.

Q. And that is given then to the driver, who delivers it to the—
A. —to the party to who it is labeled to.

Q. That you do in every instance, do you?

A. Yes, sir.

The COURT: Where is the tag put on?

A. Over at Stillings—put on at Stillings.

Mr. DEMPSEY: Now, you do that at your place of business in Missouri?

A. Yes, sir.

Q. So that whatever orders you deliver are delivered in the original packages?

Q. It is delivered in the package as it leaves your place of business in Stillings, Missouri; that is, delivered in the same condition to the customer or the consignee that it was in when it left your place of business in Missouri?

A. Yes, sir, the packages are all sealed, and they are never opened until they get to the customer.

Q. The name of the customer is put on the package?

A. Yes, sir.

68 Q. Before it leaves your place of business in Missouri?

A. Yes, they are all put on over there in Missouri.

Mr. DEMPSEY: I believe that is all.

Mr. JACKSON: How do you seal those packages?

A. They are sealed in Kansas City.

Mr. JACKSON: Addressed to you in carload lots?

A. They are not addressed to me; they are billed to me.

Q. And you put a label on there at Stillings—the name of the customer to whom it is to go in Leavenworth?

A. Yes, sir.

(Witness excused.)

MICHAEL KIRMEYER recalled for further examination by the Court, and testified as follows:

Examination by the COURT:

Q. Suppose you get an order from some man at Oskaloosa accompanied by the cash in the envelope, what do you do in filling that order?

A. I make out the bill of lading and put a label on the cask, or whatever it may be, and ship it.

Q. Tell the routine in shipping—you say you make out a bill of lading over there?

A. Yes, sir. I make out the bill of lading and put the party's name on it, and haul it down to the Santa Fe depot.

Q. What do you do with the label?

A. Put it on the case, or cask, whichever it may be.

Q. Then you put it in your own wagons?

A. Sometimes; sometimes I hire a wagon to take it to the road.

69 Q. Then what do you do with it?

A. We take and deliver it to the railroad company.

Q. And then you sign a bill of lading?

A. Yes, sir.

Q. And turn it back to you?

A. Yes, sir.

Q. If that goes to Oklahoma, what do you do?

A. Just the same thing.

Q. If it goes to Winchester or Easton or any of those places?

A. We take it to whichever road runs there.

Q. You label it over there?

A. We label it over there and put it in a wagon and take it to the depot to whichever railroad runs there, that is the Santa Fe or the Union Pacific, or whichever it may be.

Q. Suppose you get an order from here from some man in the city—say a money order in a letter, how do you fill it?

A. I make out one of those labels, put it on the wagon and send it to his house.

Q. Do you give the driver a slip and tell him to deliver it to such and such a place?

A. No, he usually gets that label.

Q. Did you ever give him slips and tell him to go to those different places?

A. I usually make out the labels for the different places where they are to go. In summer I put the slips on in rotation, so he can find them.

Q. Where do you put the label on?

A. On top of the case.

Q. Where is the case labeled?

A. To where the man orders it.

Q. How do you put the slip on?

A. Paste it on.

Q. On the case?

A. On the case.

Q. Where is the case?

A. In the warehouse.

70 Q. Where is that?

A. At Stillings.

The COURT: That is all.

Redirect examination by Mr. BREWSTER:

Q. Do you place these labels on yourself or furnish them to the drivers?

A. I give them the labels and they paste them on.

Q. Do you watch them put them on?

A. Not all the time, I help them sometimes.

Q. All liquor you ship from Oskaloosa you bill out from Leavenworth?

A. No, I bill it from Stillings.

Q. Is that the kind of bill you make?

A. We bill it "Stillings," and they bill it "Leavenworth."

Q. You send your driver with beer here to the depot in Leavenworth and they ship it from Leavenworth?

A. I make out the bill of lading.

Q. Where do you deliver it to the railroad company?

A. At their depot.

Q. They don't take the bill of lading you make out?

A. They change it from Stillings to Leavenworth.

Q. They won't accept anything shipped from Stillings?

A. Well, they have.

Q. They have no depot?

A. No, they have no depot.

Q. The first place it passes out of your hands is in the city of Leavenworth?

A. At the depot.

Q. Up to that time you have had it in your possession, the possession of your drivers?

A. Yes, sir.

Q. But you make out on blank bills, you make out a statement that it is shipped over the Santa Fe from Stillings to Oskaloosa?

71 A. Sometimes we put it Leavenworth.

Q. Sometimes you put it Leavenworth, most times you put it Leavenworth, don't you?

A. They changed it.

Q. You didn't see any use putting it Stillings, and after they began to change it you began to change it?

A. Yes, they told me they had no road running into Stillings.

Q. I say you made the change and took the beer to the city of Leavenworth?

A. To the depot at Leavenworth.

Q. That is over to the city of Leavenworth?

A. Yes, sir.

Q. To the Santa Fe?

A. Yes, sir.

Q. And there you turned it over to the railroad company?

A. Yes, sir.

Q. And it was billed out by them from Leavenworth to Oskaloosa?

A. Yes, sir.

Q. And this is true of these Oklahoma points?

A. I suppose so.

Q. And true of all the liquor that you ship that goes over the railroads who have no depots in Stillings?

A. It is.

Q. And the bulk of your shipments to Kansas points are billed from the city of Leavenworth, are they not?

A. Yes, sir.

Q. And never pass out of your hands until they reach the city of Leavenworth?

A. Why, of course not.

I know a man by the name of Daily. I have sold to him. It has been quite a while since I sold beer to him. I sell him a case

72 at his house once in a while. They are delivered in this way: He orders it over there; he orders it at Stillings, and I make out a label for him and put it on the case and send it over. I suppose it has been four or five months since I have sold him anything. I could not say whether I sold him any in March or not. Yes, my books will show. I have not my books with me now, I sent them back across the river. I might have sold him some in March. I collect for it at his place of business. I give the labels to be pasted on these cases to the same parties that always pastes them on. No, I do not make out slips containing the name of the party to whom the goods are to be shipped. I make out labels. I would only load up the orders I had.

Q. And then the drivers would put on the various beer cases, the labels while they were over there in Stillings—the names of the parties to whom they went?

A. Yes, sir.

Q. Do they do this before or after they put them in the wagon?

A. Put them on in the warehouse.

Q. Now, I believe you said that when any one would call you up at 313 here for an order you would tell them to call up Stillings, is that right?

A. Yes, sir.

Q. How frequently would you do that?

A. Oh, they don't call down there very often; I was not up at 313 very much.

Q. When they do call up there at 313 and ask for beer you tell them to call up Stillings?

A. I would say, "Call up across the river."

Q. And then they would call up across the river?

A. I don't know.

73 Q. You would not know whether you got the order there?

A. I didn't pay attention to one order.

Q. You keep no track of it?

A. Yes, sir, we have a piece of blank paper to put them down as they get them.

Q. What would they tell you when you told them to call up across the river?

A. They would not say anything; they would say, "All right."

Q. They would say they would do that?

A. I suppose they did, yes, sir.

Q. And then you accepted the order across the river?

A. Yes, sir.

Q. And there they would take their order over there?

A. Of course, we take it if they telephone, yes, sir.

Q. How do you keep that liquor over in the warehouse?

A. How?

Q. Yes, have you a cold storage?

A. We don't have any use for cold storage?

Q. Why not?

A. Don't need it.

Q. Why not, beer moving rapidly?

- A. Why, beer don't need cold storage.
Q. For keg beer?
A. Only one day a week—Saturday.
Q. Saturday you have keg beer?
A. Yes, sir.
Q. Is it shipped in except for Saturday trade?
A. There is so little used it don't pay to keep ice.
Q. When you get a carload of beer—did you ever receive a carload of beer here?
A. Used to years ago.
Q. I mean since you have been at Stillings?
A. No.
74 Q. How much is the largest amount of beer you ever received here by freight?
A. Oh, maybe twenty cases.
Q. Over what road would this twenty cases come?
A. Why, I think once or twice they came on the Missouri Pacific.
Q. To whom were they billed?
A. They were billed, I suppose, to me.
Q. At this place?
A. That had to be billed to Leavenworth.
Q. At Leavenworth—then you got a notice from the railroad company that this beer was here at Leavenworth?
A. Yes, sir.
Q. Where would your notice be sent?
A. Well, you would not get no notices; we knew it was coming and came and got it.
Q. Would you direct it to come to Leavenworth, Kansas?
A. Yes, sir.
Q. Then you would send your teams over?
A. Send in the teams.
Q. And get this beer out?
A. Yes, sir.
Q. Send your teams over here and haul the beer across to Stillings?
A. Yes, sir.
Q. And then haul it back to Stillings?
A. No, put it in the warehouse.
Q. And then deliver it back to Stillings on the order?
A. Back to Stillings.
Q. Back to Leavenworth?
A. Take—most of it went to Platte City.
Q. These empties were all shipped—all of the empties are returned to the city of Leavenworth and shipped over the road from here, are they not?
A. Why, we ship them from here.
Q. Most of them?
A. Yes, sir.
75 Q. You do that to avoid paying the expense of hauling them across the river?
A. No, there would not be any expense.
Q. You would have to pay toll?
A. There would not be any extra expense.

Q. Why do you ship them from here?

A. Well, we have always shipped them from here—always have loaded them here, and have locks on the car down there and pay demurrage.

Q. Do you keep any empties at the barn over night?

A. Well, the drivers may.

Q. You don't know whether they do or not?

A. They are liable to come in with six or eight cases and drive in there and leave them in the wagon.

Q. And you say that place was here—where is it situated—where do you keep your wagons?

A. 117 Delaware street.

Q. Is that used in connection with your business across the river?

A. It is used for a barn.

Q. But for the purpose of—you have no use for a barn except to keep your beer wagons and horses that you haul beer with?

A. That is all.

Q. And that is used for the purpose of making deliveries of the beer across the river?

A. Well, I keep my horses and wagons.

Q. You do this in conjunction with this business across the river?

A. In conjunction?

Q. Any connection there?

A. No, sir.

Q. The only use is for the purpose of carrying on your business?

A. I keep the beer over there, but I don't the horses and wagons; there is no conjunction.

Q. You keep them for the purpose of hauling beer over there?

A. I keep the horses here because it is handier to keep them on this side.

76 Q. The only purpose you have for these horses is to use in this beer delivery?

A. Yes, sir.

Q. You get that beer in Missouri and have to bring it over in your wagons and with your horses and deliver it in Kansas, that is right, is it not?

A. Yes, sir.

Q. And then the drivers come down there and receive your orders as to what to do?

A. No, they don't; they just come down there and hitch up and go across the river.

Q. You heard your driver testify he would call you up and ask what to do?

A. He might call me at the house.

Q. Prior to the appointment of these receivers you were in business here?

A. Yes, sir.

Q. And the only purpose you had in moving across from here to Stillings was on account of the excitement and the way they were going after them for selling liquor?

A. No, it was on account of the law.

Q. But your trade remained practically the same?

A. No, the trade fell off.

Q. But a good deal of your trade remained?

A. No.

Q. The trade you are dealing with now is the same trade you had here?

A. No, they are pretty near all out-of-town.

Q. They didn't drop off all at once?

A. They dropped off gradually.

Q. But they didn't all leave immediately after your change over there?

A. No, they left gradually; that is, they found locations somewhere.

Q. As a matter of fact, at that time you had a lot of customers?

A. Yes, sir.

77 Q. And on account of the enforcement of the prohibitory law you moved across the Missouri?

A. They told me I had to move.

Q. They told you you had to move, and you did move?

A. Yes, sir.

Q. And from Stillings, Missouri, you explain, these same customers gradually became less and less?

A. No, I didn't explain—they all at that time was mostly all saloons—it was open and the private trade took the place of the saloons.

Q. It didn't do that all in one day?

A. No, not all in one day.

Q. So that there was a while there that you ministered practically to the same trade you had over here when you were in business here?

A. There was a few stayed around.

Q. How much of your mail would you say you get over here?

A. I do not get but very little mail.

Q. You get orders for beer over?

A. No, sir.

Q. None of them?

A. Oh, they might send in one once in a while and I would send it back just as I stated this morning—if I think it is a beer order. I can always tell; there is only a few towns I get them from; I cross it off and address it to Stillings.

Q. Why is it you take out of your box a letter which you think contains a beer order and send it to yourself at Stillings and not open it here?

A. I might take it over myself.

Q. Why do you not open it?

A. Because it is against the law.

Q. Your purpose in carrying it back—your purpose in putting it in the post office and carrying it to Stillings is to keep from violating the law?

78 A. They aren't very few of those.

Q. Read the question. (Question read.) Is that the purpose?

A. Yes, sir.

I suppose those lists are correct bills of lading of shipments made if they come from the railroad company; I have no reason to doubt the railroad company. I ship beer to those different parties at different times.

(The State introduces a bill of lading of the Atchison, Topeka & Santa Fe Railroad Company, numbered 5223, Leavenworth, Kansas, to Topeka, Kansas; September 28, 1910; shipped from M. Kirmeyer; John Killian, consignee; one cask of beer; weight, 250 pounds; rate and authority, 19; freight, 48. This is offered in evidence for the purpose of showing the manner in which the bills of lading were made out. So as not to encumber the record, the defendant admitted that if the freight agent were here that he would testify the list is a copy of the original bill of lading, and in so far as that testimony is concerned, it is not objected to, but it is objected to on the ground that if properly identified the same would be incompetent, irrelevant and immaterial.) Witness continuing: When a telephone order is received across the river the manner in which the order is received and accepted would be about like this: the party would say, I want a case of beer—he would want to know if I would deliver him a case of beer, and I would say, "All right." The beer from which these orders were filled were kept all piled up in a pile, and when I go to fill an order I pick up a case and have it labeled with the name of the party to whom it was to go and then the driver takes them to the various parties. I do not say as a fact within my own knowledge that my drivers keep empty cases in their wagons over night at the barn. I said they may. I could not say for sure. I have no personal knowledge, however, of their having done so. They had no orders from me to do that. I have never seen any empties down since I have been in Stillings, except on the wagons, nor in the buildings, but out in the alley, not in the yard but in the alley. The horses were not unhitched. They would come through going over to Stillings. I never saw the wagons down there with empties on in my time. I never saw them in the wagons when the wagons were unhitched.

Testimony of Ed. Dicks, Called by the State.

Direct examination by Mr. JACKSON:

My name is Ed. Dicks. I am a wholesale and retail cigar dealer. My business is located at 402 Delaware street. I am living in the city of Leavenworth, at 521 Pottawatomie street. I know Mr. Kirmeyer. I have known him about twenty-five years. I presume that within the last six months or year I have purchased liquor of him. They order it up at the house whenever they want it, and I pay for it. My family and myself have been a customer of his for the last three or four years. I have a private house. Those liquors are delivered at our residence. Formerly we lived on Ottawa street; since moving they are delivered at 227 Ottawa street. I lived there the last three years. During all of that time I have purchased liquor of the defendant for use at my home. We give those orders by calling them up over the 'phone and ordering

them. I do not do that personally. I believe my mother attends to that. I do not remember of ever calling up Mr. Kirmeyer. I think I have once or twice. I do not remember when I called him up. I do not remember of calling up 313 on either phone. I have looked it up so seldom that I am not familiar with the number. I could not say that I ever ordered liquor over the telephone of Mr. Kirmeyer, at his phone number 313. I could not say positively that I ever called him at Stillings, Missouri, and ordered liquors. I just looked at the book and called up the number, whatever it might be. Any order that I may have given has been by telephone. I do not know who delivered the liquors at my residence. I never was there when a case was delivered. I suppose the driver on the wagon does. I presume the liquors are delivered at my residence free of charge. I paid for the liquors. Well, I generally send Mr. Kirmeyer a check if he mails me a bill; if he comes himself I pay the cash. Mr. Kirmeyer either comes to my place or sends his collector there. I believe his collector is his brother, Joseph Kirmeyer. I could not say just when he called. Sometimes he would let it go a month or two and I would send him a check. He came in occasionally. I suppose he collects sometimes at the house, too. When I mail him a check I mail it to Stillings, Missouri. I usually paid these bills when he sent me a statement or came around. I could not say when these statements came usually. I don't know—I never paid any particular attention. I think he had no particular
81 time for collecting it. Sometimes my bill went two or three months. I did not say that I paid these bills right there in my cigar store in cash. I said if he came around he collected for it. I never sent Mr. Kirmeyer a written order. I do not know whether my mother or any member of my family sent a written order for liquor. All by phone orders.

Testimony of Martin Ehart, Called by the State.

Direct examination by Mr. JACKSON:

My name is Martin Ehart. I reside at 930 Osage Street in Leavenworth, Kansas. I have lived here about thirty-five or forty years. I have a place of business in that neighborhood. It is located at the corner of Tenth and Pottawatomie streets. It is a grocery and butcher shop. I am acquainted with Mr. Kirmeyer. I have known him ever since I am in town. I have not been much of a customer of Mr. Kirmeyer's within the last two or three years. I have ordered beer from him for my private use. I ordered it by calling over the telephone. I called up Stillings, Missouri. I never called up 117 Delaware street. I never called up Mr. Kirmeyer's residence and gave an order. The last time I ordered was about six months ago. It was delivered by a driver at my residence; his name was Sully. Another driver was named O'Herron. The beer came in cases of three dozen pints. That is what I always ordered. That is a full case. The driver just left the beer at my residence. He put it in the yard at the back door. I paid Mr. Kirmeyer's brother
82 and himself for the beer. I paid him money on the street, and paid him when he came up once. I have not gotten

more than three cases of beer from him since he has been over there. I paid him just when I happened to meet him. I always paid him in cash. I paid him in the city of Leavenworth. I did not pay any transportation charges for the beer.

Testimony of Henry W. Sulley.

Direct examination by Mr. JACKSON:

My name is Henry William Sulley. I live at 826 Pottawatomie street. I am the son of Sam Sulley, and have lived in Leavenworth all my life. I have known Mike Kirmeyer about ten years. I am one of his drivers. I have been hauling across the river for Mr. Kirmeyer two years. I start from home and go down and fix my team and go over to Missouri and wait until Mr. Kirmeyer gives me orders what to do. I go over with the empty wagon with two horses hitched to it. It is always empty when I go over. I just load up my orders what he gives me before I come back. I make one or two trips a day. Sometimes one in the morning and the other in the afternoon. I don't often make three trips a day. Have never made four trips a day. I deliver sometimes after 6 o'clock. I never go over for a load after 6 o'clock. Mr. Kirmeyer makes up the orders over in Stillings for me. I load the boxes and cases on my wagon, and the other drivers help me load mine and I help them load theirs. I never take orders over the telephone. I never

83 take orders at 117 Delaware street. I deliver the cases after I get them on my wagon to wherever they are to be delivered.

I deliver them to private houses to the people that order them whose name is on the labels. I do not haul to any other places except to Leavenworth. My deliveries are made to private houses. They are residences where people live. After I get there with my cases I give them to the person that orders them and tell them that Mr. Kirmeyer sent me there with them. I unload and take them in I put them where the people tell me to put them, in the house or in the cellar. I never collect the bill when I deliver the beer. I collect bills for Mr. Kirmeyer when he sends me out with a bill. He does that sometimes the first of the month and sometimes on week days. He does not send me to all of the customers that I deliver to, just certain customers. I take the bills to them and they sometimes mail a letter to him and pay him for it. I just leave the bill there with them. They pay me some that they owe. I collect money right here in Leavenworth for Mr. Kirmeyer when I am sent with a bill. I never collect when I pick up empties. I do not go around and pick up empties. I do that when they order me to come and get them, or when Mr. Kirmeyer tells me to come and get the empties. I do not set any particular day to go around and collect empties. After I collect the empties I take them down and put them in a car in the yards. It takes four or five days to fill a car. The car sets there all the time. I pay toll to come across the bridge, 50 cents. I

84 pay the toll man at this end of the bridge. I do not pay for every one of them, but I generally pay 50 cents for every

trip.

Q. Do you ever bring a load over there in the evening and leave it down there in the stable over night?

A. No, sir.

Q. Are you ever at the barn, Mr. Sully, when the telephone rings, when that number is called up?

A. Yes, sir.

Q. Do you answer the phone?

A. Why, I answer yes, sir, some times I answer it.

Q. And suppose there is a customer at the other end of the line wanting a case of beer, do you take his order?

A. No, sir, I do not take no order, no, sir.

Q. Does any one ever call you up at 313 and order beer of you?

A. Never ordered none from me; I never did take any orders.

Q. Do they ask for beer there?

A. Never ask me for any.

Q. What do they talk about over the phone?

Q. Yes, when the telephone rings and you are there what do they talk to you about?

A. I generally get it from Mr. Kirmeyer, or a woman over in Missouri, and they tell me what to do—tell me to come over there.

Q. Do any of your customers ever call you up over that phone there?

A. No, sir.

Q. Are you ever called to that 'phone from any other point except Stillings?

A. Only from the storage over there.

Q. Do you stay down there at nights?

A. No, sir.

Q. Who is in charge of the stables down there?

A. Why, all of us drivers, that is all.

85 Q. Who are the other drivers, Mr. Sulley?

A. Mr. O'Herron and Mr. Swenk.

Q. Do you know of anybody using this telephone besides Mr. Kirmeyer using telephone 313 Main while you are there?

A. No, sir, I do not.

Q. Do you ever go down to the Missouri Pacific depot and get liquor?

A. No, sir, I have been down there maybe two trips since I have been working there.

Q. What did you get those two times?

A. I got a few cases.

Q. What did you do with those cases?

A. I took them over in Missouri.

Q. Took them over to Stillings?

A. Yes, sir.

I do not remember of hauling any cases of beer to the Santa Fe depot here in Leavenworth. I have been delivering for Mr. Kirmeyer for two or three years, but he never sends me down in that part of town. He sends on of the other drivers. I do not know who it is for sure. He has three drivers. O'Herron generally goes down that way. He must handle the freight depot business.

Testimony of John O'Herron, Called by the State.

Direct examination by Mr. JACKSON:

My name is John O'Herron. I live at 610 North Fourth street in Leavenworth, Kansas. I have been living in Leavenworth for the last three or four years. Have been driving for Mr. Kirmeyer about two years and two months. My duties are to go to the stables and get the teams ready and go over to Missouri every morning with a two-horse wagon. After I get over there I wait for orders. I load the beer up—part of it. I haul Rochester beer. That is all I haul. I load the cases. I sometimes put the labels on them. Mr. Kirmeyer gives them to me. Those labels are for whoever orders them, I guess. I do not take orders over the telephone. I have nothing to do with the telephone. I have never taken an order since I have been driving for Mr. Kirmeyer.

Q. Have you ever had anybody call you up and try to give an order?

A. I got nothing to do with the telephone whatever.

Q. Suppose you are down there at 117 Delaware street and the telephone rings?

A. I have no business there at all.

Q. Who goes to the phone?

A. I don't know.

Q. Do you know who does go?

A. I got no business up there; all I got to do is to take care of my horses at the barn.

Q. You do not quite answer the question, Mr. O'Herron. Suppose you are there and the telephone rings, do you go to the telephone?

A. No, sir.

Q. Who does go?

A. Whoever wants to go.

Q. Suppose you are the only one there?

A. It can ring.

Q. You would not go to the telephone?

A. No, sir.

Q. Afraid of it?

A. No, sir, I ain't scared of it; I have got no business there.

Q. Have you instructions from Mr. Kirmeyer not to go to that phone?

A. I never answer it—never go near it.

87 Q. He does not keep a man there to answer it?

A. The stable man is down there part of the time.

Q. What is his name?

A. I don't know what his name is.

Q. He don't keep a stable man all the time?

A. No, sir.

Q. While you are there where is the stable man?

A. He is there when I am gone.

Q. Any of the other drivers there?

A. Part of the time.

Q. When you are there and the telephone rings you do not go near it?

A. No, sir.

Q. Is anybody left in charge of those stables during the day-time?

A. No, sir.

Q. Are they open all day long, or locked?

A. Locked up when we leave.

Q. After you get your horses?

A. Yes, sir.

Q. Is there any place for an office?

A. Not as I know of.

Q. Where do you keep the wagons—on the first floor?

A. Out in the yard.

Q. Out in the yard—where do you keep the horses?

A. In the basement.

Q. What is on the first floor, if anything?

A. A whole lot of old stuff stored there.

Q. What is it?

A. Old wagons and stuff.

Q. Anything else?

A. That is all I know.

Q. Any cases stored there?

A. No, sir.

Once in a while I haul beer down to the freight depots here in the city. I very seldom do that now. Not while I was with Kirmeyer did I haul to the freight depots oftener than I do now.

88 I remember of hauling beer to the Santa Fe freight depot now and then, not very often. When I go there I just put it on the platform. No, I do not take a way bill for it. Just give me a way bill and they sign it, that is all I know about it. I then trun it over to Missouri—take it over to Mr. Kirmeyer. I have once or twice gone to the Missouri Pacific freight depot here in Leavenworth and loaded beer on my wagon. I can only remember of once or twice. I hauled that beer over to Missouri. I do not remember how long that was. After I got it over to Missouri I put it in the warehouse. There was just a few cases of it. I do not do any collecting for Mr. Kirmeyer. I do not collect any bills for him. I take up empties and I deliver at residences. That is all I deliver to. I do not deliver to any joints around town. I do not know of joints. I load these empties here in an empty box car. No, the loads that I bring across the river are not pretty good loads. They do not send much any more, the business is getting poor. Oh, I don't know how many cases I usually bring over—sometimes eight or ten or twelve, something like that. I never work at night.

Testimony of Henry Werner, Called by the State.

Direct examination by Mr. Bond:

My name is Henry Werner. I live at Tenth and Shawnee streets. I have been living there since the 11th of January three years ago.

Yes, I buy beer—I buy it from different parties when I have the money. Yes, I have bought some from Mr. Kirmeyer.

Sometimes I buy a case a month—maybe not for two or three months. I buy one case at a time out there. It is for my own use. No, I do not remember whether or not in July, 1909, I bought three cases of Rochester beer in pint bottles. I do not remember of the sheriff raiding me on the 17th day of July, 1909, and seizing three cases of Rochester beer.

Q. Who do you buy Rochester beer from when you buy it?

A. Well, I generally telephone to have it delivered.

Q. You telephone who?

A. To the office.

Q. What office—down on Delaware?

A. No, they get it over at Stillings now.

Q. Who did you order it of when they had an office here—where did you telephone from?

A. From my own place.

Q. Where would you 'phone?

A. To his office.

Q. And that is on Delaware street—there is where you would telephone?

A. You mean 1909?

Q. At any time?

A. That was 800 Cherokee.

Q. Did you ever telephone down to Cherokee for orders?

A. No, sir.

Q. When they didn't have a place in Leavenworth then you telephoned across the river?

A. Yes, sir.

Q. Who would you ask for?

A. Anybody in the office.

Q. And the next morning a man would come along with the beer you ordered?

A. Yes, sir.

Q. When would you pay him.

A. Most of the times I went over the river and paid for it myself.

Q. Take the times you didn't go over the river and pay for it?

A. I generally write out a check on the bank and sign a check over to and put it in the mail and put the money in the bank.

Q. Tell us any one time you mailed a check?

A. I could not remember the time.

Q. What bank did you draw the check on?

A. Wulfekuhler's bank generally.

Q. Have you sent a check within a year?

A. No, sir.

Q. Within two years?

A. Yes, within two years, since I have been doing business.

Q. Over two years since you bought any beer from them?

A. No, I bought two cases since.

Q. How did you pay for it?

A. My boy went and paid for it.

Q. He dropped over and paid for it?

A. Yes, sir.

Q. That was how long ago?

A. I think that was last fall on Labor Day, he and a cousin of mine went over a fishing and they went and got a case of beer.

Q. You have not got any beer or liquor from Mr. Kirmeyer since the last Labor Day?

A. No, sir.

Q. Do you ever remember paying the driver, or he presenting a bill to you at the end of the month for whatever you bought; and you paying him?

A. He never presented a bill to me.

Q. Never presented a bill to you?

A. No, sir, never did.

Q. State whether or not you ever gave the driver an order when he delivered a case to you—told him to bring another case next week, or anything of that kind?

A. No, sir.

91 *Testimony of Ben Samuels, Called by the State.*

Direct examination by Mr. BOND:

My name is Ben Samuels. I am a resident of Leavenworth, and have been for many years last past. I know Mr. Kirmeyer and have known him for a long time. I have purchased beer from Mr. Kirmeyer. I think it about a month or so since I purchased beer. It was a case of beer. I called up over the phone at Stillings. It was delivered to me in a wagon, as they usually do. No, I didn't pay for it when it was delivered. Whenever Mr. Kirmeyer would come around or whenever I would meet him I would pay him. No, I never paid the driver who delivered the beer. The only time I paid would be when I met Mr. Kirmeyer, either on the streets or sometimes he would drop around. I could not say exactly how many times I have purchased—in the last year. I do not remember what number I called up—I could not say. I just looked in the telephone book and got the Stillings 'phone. I think it is 54 or something like that. Yes, I looked in the book and saw that it read Stillings. That is my recollection. No, I never went down or phoned to the office here and gave any orders. I do not know whether he ever had an office here in Leavenworth. I probably did buy something from him about September, 1909. The chances are I did. I paid for it the same way I do now, whenever I saw him. My credit was always good.

92 *Testimony of John Welch, Called by the State.*

Direct examination by Mr. Bond:

My name is John Welch. I reside in Leavenworth and have for many years last past. I know Mr. Kirmeyer. Yes, I have bought a few cases of beer from him. The last time I bought any from him is almost a year ago—about the last of August—a year this coming August. I could not tell whether it was in August; it has been some time ago. I ordered beer from Stillings, Missouri. By telephone—called up. No, I do not know who I was ordering it from. Just called up the office whoever was there at Stillings, Missouri. Yes, the beer would be delivered to my residence. No, I don't believe I paid Mr. Kirmeyer for the last few cases I got. I think I owe him yet. No, I never paid the driver for any that was delivered to me. I always paid Mr. Kirmeyer when I met him on the street here in Leavenworth. The driver never brought a bill to me. He never made me pay for the goods when they were delivered.

The appellee hereby certifies that the above and foregoing is a true and accurate abstract of the testimony in the case which he deems necessary for the consideration of the Court.

A. E. DEMPSEY AND
F. P. FITZWILLIAM,
Attorneys for Appellee.

93 Be it further remembered, That afterwards, on the 3d day of December, 1912, the same being one of the regular judicial days of the July Term, 1912, of the Supreme Court of the State of Kansas, in session in the Supreme Court room in the City of Topeka, the following proceeding among others, was had, and entered of record in words and figures as follows, to-wit:—

94 In the Supreme Court of the State of Kansas.

Friday, December 3, 1912.

No. 18396.

THE STATE OF KANSAS, Appellant,
vs.
M. KIRMEYER, Appellee.

Journal Entry of Submission.

This cause comes on to be heard, on the notices of appeal, transcript of the judgment and abstract of the record of the district court of Leavenworth county; thereupon, after oral argument by S. M. Brewster, Assistant Attorney General, for the Appellant, and by F. P. Fitzwilliams, for the appellee, said cause is submitted on brief of counsel for both parties and taken under advisement by the court.

95 Be it further remembered, That afterwards, on the 11th day of January, 1913, the same being one of the regular judicial days of the January Term, 1913, of the Supreme Court of the State of Kansas, in session at the Supreme Court room in the City of Topeka, the following proceeding among others, was had and entered of record in the words and figures as follows, to-wit:—

96 In the Supreme Court of the State of Kansas.

Saturday, January 11, 1913.

No. 18396.

THE STATE OF KANSAS, Appellant,

vs.

M. KIRMEYER, Appellee.

Journal Entry of Judgment.

This cause comes on for decision; and thereupon it is ordered and adjudged that the judgment of the court below be reversed, and that this cause be remanded with instructions to enter judgment for the State, as prayed for in the petition. It is further ordered that the appellee pay the costs of this case in this court taxed at \$—, and hereof let execution issue.

97 And also, on the same day, to-wit:—the 11th day of January, 1913, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, a syllabus, and the Court's written opinion herein, which syllabus and opinion are in the words and figures as follows, to-wit:—

98 No. 18396.

THE STATE OF KANSAS, Appellant,

v.

M. KIRMEYER, Appellee.

Appeal from Leavenworth County.

Reversed.

Syllabus by the Court—Benson, J.

1. A finding consisting only of conclusions from basic facts found in detail from which it is deduced, can not be upheld where it is in conflict with them. The basic facts must prevail over the conclusion.
2. Where the commerce clause of the federal constitution is invoked as a protection to traffic in intoxicating liquor, the courts are not precluded from an inquiry into methods and practices to determine whether the transactions involved

constitute legitimate inter-state commerce, or are colorable merely and intended to evade and defeat the just operation of the constitution and laws of this state.

3. A citizen of this state whose business is prohibited here can not, under the guise of moving his stock in trade across the state line and other shifts or devices to evade the statutes of the state continue the prohibited business here and be immune from the penalties of our law.

All the Justices concurring.

A true copy.

Attest:

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court.

99

18396.

Statement.

This appeal is from a judgment for the defendant in an action prosecuted by the attorney-general and county attorney 'to abate and enjoin a public nuisance. The petition charges a nuisance committed by the defendant in the open and persistent violation of the prohibitory liquor laws. The petition contains the same averments as those held to be sufficient in *The State v. Rabinowitz*, 85 Kan. 841, 118 Pac. 1040, and also the following.

"Plaintiff further alleges that for several months prior to the institution of this action the said defendant has kept and maintained, and does still keep and maintain, in the city and county of Leavenworth, certain warehouses or store rooms for the purpose of selling and storing intoxicating liquors therein, and for the purpose of the stabling of wagons loaded with intoxicating liquors, and for the purpose of stabling teams and caring for the same, used in the transportation of intoxicating liquors from said town of Stillings, in the county of Platte, in the state of Missouri, and your petitioners are informed and believe that the said defendant so keeps and maintains said ware houses or storeroom on premises known as No. 117 and No. 117½ Delaware street, in the city of Leavenworth, Kansas."

The prayer is:

"That he (the defendant) be enjoined from conducting said unlawful business; that he be enjoined from maintaining, using and employing said wagons, vehicles, conveyances, horses, mules, telephones and any other property in the said unlawful manner herein alleged; that upon the final determination of this action said injunction be made permanent; that said wagons, vehicles, conveyances, horses, mules, telephones and other property used in said

unlawful business be declared common nuisances and that the same be abated”

Findings of fact were made too lengthy for insertion here. The material facts found and stated by the district court are as follows:

The defendant is a resident of Leavenworth and a dealer in

100 beer in which business he has been engaged for many years.

Before the year 1907 his place of business, warehouse, and barn were in the city of Leavenworth. About that date he moved his place of business to Stillings, Missouri, one and one-half miles from Leavenworth where he has ever since kept an office and warehouse where he receives beer in carload lots. He pays a revenue tax to the federal government, a merchant's tax in Missouri, and taxes upon his property located in that state. He has no license to sell liquor in this state. His office in Stillings is connected with the telephone exchange in Leavenworth. He receives orders there by mail and telephone for beer, which if accepted he fills by tagging the cases, kegs or casks with the name of the person giving the orders and deliveries are then made in the original packages by his own teams and wagons or by deliverymen. About 85% of the orders from persons residing in Leavenworth are by telephone, and his trade in that city amounts to about \$500 per month. Orders from persons in other places are filled by tagging and hauling the beer to the railroad depot in Leavenworth and bills of lading are given from that point. There is a freight depot but no station agent at Stillings, and no post-office. Some beer is received by him at the station in Leavenworth and hauled therefrom by his team to the Stillings warehouse. The defendant's drivers do not solicit orders or make collections. The defendant makes collections, usually in person, or by collector, and some payments are made by mail. He does a family trade in Leavenworth, selling beer only for private use. When he moved his place of business to Missouri, he moved his teams and wagons theretofore used in the business from another place in the city to 117 Delaware street, Leavenworth, and installed telephones there, numbered 313, which he still maintains. Occasionally orders for beer are given over such telephones to No. 117 Delaware street but are answered by requesting that the place of business at Stillings be called up. Mail orders are also occasionally addressed to the defendant at Leavenworth but are either taken or sent by him to his place of business at Stillings before

101 being opened. Ever since he engaged in the business the defendant has carried advertisements in two newspapers in Leavenworth reading:

“MICHAEL KIRMEYER,
Stillings, Missouri.
ROCHESTER BEER.
Family Trade Especially.
Phones 313.”

The telephone numbers were not changed through oversight when he changed his place of business to Missouri. In making deliveries from the Stillings warehouse and at the Leavenworth depot his

wagons use the Missouri river bridge and the streets and alleys of the city of Leavenworth. The teams and wagons stand upon these streets while deliveries of beer ordered and tagged as before stated are being made.

The following finding was also made:

"The defendant's residence in the city of Leavenworth, Kansas, and the keeping by him of his teams and wagons used by him in his said business, in said city, is not intended as a subterfuge or a shift or device on his part to circumvent or defeat the prohibitory laws of the state of Kansas. Neither is the fact that mail is occasionally addressed to him at Leavenworth, Kansas, instead of Stillings, Missouri, nor the fact that he maintains telephones at his stables in the city of Leavenworth, Kansas, and advertises in said papers above mentioned, intended by him as a shift, and none of these circumstances actually tend to circumvent or defeat the laws of the state of Kansas."

The testimony of the defendant further shows that he has resided in Leavenworth thirty years, and has been in the liquor business "off and on" since he was old enough. About four or five years before the trial when receivers in cases pending in this court against several brewing companies came to Leavenworth, he "moved across" to Stillings. Stillings contains one store, a round-house and ten or fifteen residences and eight or ten beer warehouses. Occasionally beer is shipped to the defendant over a railroad consigned to Leavenworth. This beer is hauled in defendant's wagons from the
102 depot in Leavenworth to his warehouse in Stillings. Deliveries by wagon are only made in Leavenworth. Empties from the Leavenworth trade are all gathered up by the drivers, hauled to and shipped from the Leavenworth depot to a brewery in Kansas City, Missouri, without being taken to Stillings. Sometimes empties are kept in the barn at No. 117 Delaware street over night where the wagons and teams are kept for making deliveries.

To further indicate the nature of the defendant's business we quote from his testimony:

"Before I moved across I received my liquors here in Leavenworth. I have been receiving my liquors at Stillings since I moved across. There is a freight depot at Stillings, but no agent there. I am a dealer in a beer known as Rochester beer. It comes from Kansas City, Mo. That is the only beer I handle. Nearly all of it comes to Stillings in carload lots. I handle nothing but beer. The beer comes to me in regular beer cases, barrels and kegs. Some of the cars come to me over the Burlington and some over the Chicago Great Western. Some of it comes over the Missouri Pacific. Where it comes over the Missouri Pacific it is unloaded at the freight depot in Leavenworth and I haul it across the river in my own wagons. I do not deliver any from the Missouri Pacific depot in Leavenworth. When I get an order for beer from Oskaloosa, Topeka and other points in Kansas I bring the beer over to the freight depots in Leavenworth, Kan., in my own wagons and ship it out from there. I do this because there is no freight agent at Stillings, Mo. Leavenworth is the only place to load it. Ever since I have been doing

business at Stillings I have had stables and a warehouse at No. 117 and 117½ Delaware street, in Leavenworth, Kan. I keep my horses and wagons there. I have quite a few wagons there. These horses and wagons belong to me. I have both Leavenworth telephones at Stillings, Mo. The numbers of these phones are 54 on the Bell and 101 on the Peoples. I also have both phones at my stables, at No. 117 and 117½ Delaware street, in Leavenworth. Both of these phones have the same number. It is 313. I also have a telephone at my home in Leavenworth. I receive my orders for beer at Stillings, some by letter and some by phone. There is no postoffice at Stillings. I get my mail in Leavenworth, but I do not open up my beer orders there. I either remail them to Stillings or take them over there before opening them. I open up personal letters in Leavenworth.

103 "Q. What per cent of your orders for beer from Leavenworth, Kans., do you receive by mail?

"A. Well, we do not get but about 15 per cent.

"Q. Then 85 per cent from Leavenworth are telephone orders?

"A. Yes, sir. My telephones are all connected directly with 'central' at Leavenworth. I pay no toll except my monthly bill.

"Q. The same as any other telephone. Now, Mr. Kirmeyer, you receive orders for beer at No. 117 Delaware street, do you not?

"A. Why, once in a while. We tell them to call up the other number * * *

"Once in a while a driver lays off or there is a rush, and then I hire wagons to deliver for me. I pay them. My wagons usually come over once a day. Sometimes we fill special orders. If customers are in a rush we accommodate them. I can not name any customer who is charged for delivering beer to him. I can not remember a single case in which I have made any charge for delivery. My drivers are not supposed to take orders for beer as they go round to make deliveries. They do not do this that I know of. Most of my trade in Leavenworth is what is called 'family trade.' My drivers deliver the beer at residences. When the order is received at Stillings over the telephone the name of the party is put on a tag or label, this is either given to the driver or put on a case of beer in the warehouse at Stillings and then my drivers haul the cases across the Missouri river and deliver them. We use the streets and alleys of Leavenworth in making these deliveries. * * *

"My drivers take up the empties around town. They load them in a car in the yards here in Leavenworth, and when the car is filled I ship them back to Kansas City, Mo.

104 Q. Now, when your drivers go around to take up these empties they sometimes collect from customers, don't they?

A. Why, they do if I give them a bill, a statement.

Q. And how often do you give them a bill to collect when they take up empties?

A. Well, I could not remember as to that.

Q. About how often?

A. Oh, I could not say; it depends on what locality they are going

to and who the customers are. Most of the people I collect from. * * *

Q. What did those receivers do here, so far as you were concerned?

A. Why, they scared everybody up.

Q. After that you moved across the river?

A. Everybody moved.

Q. You have more family trade than you had then?

A. Why yes, in family trade.

Q. Did you do any family trade before you went to Stillings?

A. Yes, sir.

Q. Delivered liquor at residences?

A. Delivered beer.

Q. Delivered beer at residences. What change, if any, has been made in your method of doing business, so far as the family trade is concerned, since you went to Stillings?

A. Well, there ain't much change in the way of doing business. * * *

Q. Do you place these labels on yourself or furnish them to the drivers?

A. I give them the labels and they paste them on.

Q. All liquor you ship to Oskaloosa you bill out from Leavenworth?

A. We bill it Stillings and they bill it Leavenworth.

Q. You send your driver with beer here to the depot in Leavenworth and they ship it from Leavenworth?

A. I make out the bill of lading.

Q. Where do you deliver it to the railroad company?

A. At their depot.

Q. They don't take the bill of lading you make out?

A. They change it from Stillings to Leavenworth.

Q. They do not accept it as shipping it from Stillings?

A. Well, they have.

105 Q. They have no depot?

A. No, they have no depot.

Q. The first place it passes out of your hands is in the city of Leavenworth?

A. At the depot.

Q. Up to that time you have it in your possession, the possession of your driver?

A. Yes sir. * * *

Q. And the bulk of your shipments to Kansas points are billed from the city of Leavenworth, are they not?

A. Yes sir.

Q. And never pass out of your hands until they reach the city of Leavenworth?

A. Why, of course not.

Q. Now I believe you said that when any one would call you up at No. 313 here for an order, you would tell them to call up at Stillings. Is that right?

A. Yes sir.

Q. When they do call up there at No. 313 and ask for beer, you tell them to call up Stillings?

A. I would say, 'Call up across the river.' * * *

Q. Prior to the appointment of these receivers you were in business here?

A. Yes, sir.

Q. And the only purpose you had in moving from here to Stillings was on account of the excitement and the way they were going after them for selling liquor.

A. No, it was on account of the law.

Q. As a matter of fact, at that time you had a lot of customers?

A. Yes, sir.

Q. And on account of the enforcement of the prohibitory law you moved across the river?

A. They told me I had to move.

Q. How much of your mail would you say you get over here?

A. I do not get but very little mail.

Q. You get orders for beer over here?

A. No, sir.

Q. None of them?

A. Oh, they might send in one once in a while and I would send it back just, as I stated this morning, if I think it is a beer order. I can always tell; there is only a few towns I get them from; I cross it off and address it to Stillings.

Q. Why is it you take out of your box a letter which you think contains a beer order and send it to yourself at Stillings and
106 not open it here?

A. I might take it over myself.

Q. Why do you not open it?

A. Because it is against the law.

Q. Your purpose in carrying it back—your purpose in putting it back in the post office and carrying it to Stillings is to keep from violating the law?

A. They aren't very few of those.

Q. Is that the purpose?

A. Yes, sir. * * *

Q. Now, this beer from which these orders were filled, how was it kept—all in one mass?

A. It was all piled up in a pile.

Q. And when you go to fill the various orders you pick up the cases and have them labeled with the names of the party to whom you want them to go, and then the drivers take them to the various parties; is that right?

A. Yes, sir."

Within three days after the findings were presented the state moved for a modification of the 15th finding so as to find that the methods of the defendant and conduct of his business were but a shift, device or subterfuge to evade the law, and for modifications of other findings. The court refused to modify the 15th finding, but made some modifications in others and thereupon on July 20, 1912, a motion of the state for judgment on the finding was denied. Judgment was rendered against the state for costs. On the same day a motion of the state for a new trial was overruled.

107 The opinion of the court was delivered by BENSON, J.:

By the prohibitory liquor law of 1881, enacted pursuant to the constitutional amendment of the preceding year, and in various amendments and supplemental acts, the manufacture, sale or barter of spirituous, malt, vinous, fermented or other intoxicating liquor was prohibited, provided that sales might be made for medical, scientific and mechanical purposes, as provided in the act. At the legislative session of 1909, amendments were made eliminating the exceptions, making the prohibition absolute. (Gen. Stat. 1909, Secs. 4361, 4362.) At the next legislative session an amendment was adopted providing that sales of alcohol in specified quantities might be made by certain wholesale druggists under restrictions therein stated. (Laws of 1911, chap. 178.) The prohibitory law provides that any person who shall directly or indirectly sell any of the liquors referred to shall be punished as in the act specified. (Gen. Stat. 1909, Sec. 4362.) It further provides that:

"Any person who shall take or receive any order for intoxicating liquor from any person in this state, or any person who shall, directly or indirectly, contract for the sale of intoxicating liquor with any person in this state, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished therefor as provided in this act for selling intoxicating liquor." (Gen. Stat. 1909, Sec. 4365.)

It is also declared that:

"The giving away of intoxicating liquor, or any shifts or device to evade the provisions of this act, shall be deemed an unlawful selling within the provisions of this act." (Gen. Stat. 1909, Sec. 4372.)

Provisions are also made for the punishment of offenders who maintain places or are guilty of practices in violation of the law which are denounced as common nuisances, and for abating and enforcing such nuisances. (Gen. Stat. 1909, Sec. 4387, 4388.)

It was held in *The State v. Rabinowitz*, 85 Kan. 841, 118 Pac. 1040, that acts done in violation of law or which are against
108 good morals are public nuisances and that the sale and delivery of intoxicating liquors on the streets and alleys of a city publicly, repeatedly and persistently is a common nuisance which may be enjoined in a court of equity under section 265 of the civil code by an action in the name of the state. (Syl. pars. 1 & 2.)

The question to be determined here is whether the facts proven are sufficient to bring the case within these principles. The defendant contends that his business is protected as interstate commerce under the commerce clause of the federal constitution. It appears that he was keeping for sale and selling beer for years in Leavenworth in violation of law until he became alarmed by the appearance of receivers in prosecutions against brewers. He says this "scared everybody up," and as he says "everybody" moved across the river, and admits that there was not much change in the way of doing business. The principal changes appear to be the storage of his stock just across the river in Missouri where eight or ten

liquor warehouses were established convenient to Kansas but where there was no station agent or postoffice. At the time when he thus moved across he leased another place in Leavenworth equipped it with telephones, quartered his teams and wagons there, and continued to use them in making deliveries as he had before done. When orders were received at this place in Leavenworth by mail he took or sent them into Missouri before even opening them. Applicants for beer by telephone at the number carried in his own advertisement were told to call up across the river. Although his drivers did not take orders to his knowledge they made collection when he gave them bills for that purpose. Empties were handled directly from the Leavenworth place of business to the Leavenworth depot. Shipments to points in Kansas outside the city were made at the same depot. Kegs and other receptacles were labelled by the defendant or by his teamsters to fill orders in Leavenworth, and hauled daily to customers in the city. Why was this warehouse established just across the river which required over a mile of extra hauling and the payment of tolls at the bridge? Why were letters, 109 received by the defendant in person at his place of business in Leavenworth, remailed to be again delivered to himself at Stillings, a mile and a half away? Why did he refrain from opening orders for beer until he was across the bridge? In short, why did he resort to these new methods? It is not unjust to the defendant to say that his own testimony furnishes the answer. "It was on account of the law." Plainly stated these things appear to have been done to evade the laws of this state—to carry on business of the character theretofore done in violation of law in such a manner as to avoid its penalties.

We do not overlook finding No. 15, quoted above, that these things were not intended as a shift and that none of these circumstances tended to circumvent the law, but this finding is a conclusion or complex fact deduced from the underlying, basic facts found and stated in detail and which do not support the conclusion. Neither is it supported by the testimony of the defendant himself. The basic facts must prevail over such conclusions.

(Central Branch U. P. R. Co. v. Henigh, 23 Kan. 347, 359, 33 Am. Rep. 167;

Penrose v. Cooper, 88 Kan. 210, — Pac. —;

Warder v. Ensen, 73 Cal. 291, 14 Pac. 874.)

The finding that the telephone numbers 313 were not changed through oversight relates to the advertisement. The telephone service by that number was installed at 117 Delaware street when the move was made across the river as shown by other findings and by Mr. Kirmeyer's testimony. Such practices as the storage of liquor across the state boundary, the remailing of letters received in Kansas, to himself in Missouri, and the repetition of telephone orders across the line, can not give the high sanction of the federal constitution to an otherwise unlawful traffic.

An interpretation of the law which gives effect to the mere form without regarding the substance only serves to bring its administra-

tion into reproach. The broad question here is whether the defendant was really engaged in commerce between the state of Missouri and Kansas, or was he only seeking by tricks and devices to
 110 evade the laws of his state—doing by indirection that which could not lawfully be done by ordinary and direct methods. Real interstate business needs no such methods to establish its character, and a wholesome regard for the administration of justice will not tolerate such evasions.

Numerous cases in the federal supreme court are cited by the defendant wherein persons engaged in good faith in interstate commerce have been protected under the commerce clause of the constitution. There is no disposition in this court to hold contrary to these decisions but there is an earnest purpose to follow them. The opinions of that court, however, do not preclude a fair inquiry into methods and practices in order to determine whether transactions under investigation constitute legitimate interstate commerce or are colorable merely and intended to evade and defeat the just operation of the constitution and law of the state.

In *Austin v. Tennessee*, 179 U. S. 343, the question of good faith was considered. The court said:

"Without undertaking to determine what is the proper size of an original package in each case, evidently the doctrine has no application where the manufacturer puts up the package with the express intent of evading the laws of another State, and is enabled to carry out his purpose by the facile agency of an express company and the connivance of his consignee. This court has repeatedly held that, so far from lending its authority to frauds upon the sanitary laws of the several States, we are bound to respect such laws and to aid in their enforcement, so far as can be done without infringing upon the constitutional rights of the parties."

Referring to the claim that each of the packages of cigarettes was a separate and distinct importation, the court said:

"We can only look upon it as a discreditable subterfuge, to which this court ought not to lend its countenance." (P. 361.)

The right of the state to protect its citizens with respect to commodities deemed injurious to health, is thus referred to in the same opinion:

111 "The doctrine that the silence of Congress as to what property may be of right carried from one State to another means that every article of commerce may be carried into one State from another and there sold, ought not to be extended so as to embrace articles which may not unreasonably be deemed injurious in their use to the health of the people. * * * Of course, it is one thing to force into a State, against its will, articles or commodities that can have no possible connection with or relation to the health of the people. It is quite a different thing to force into the markets of a State, against its will, articles or commodities which, like cigarettes, may not unreasonably be held to be injurious to health." (P. 362.)

In *Cook v. Marshall County*, 196 U. S. 261, it was said:

"While it is doubtless true that a perfectly lawful act may not be

impugned by the fact that the person doing the act was impelled thereto by a bad motive, yet where the lawfulness or unlawfulness of the act is made an issue the intent of the actor may have a material bearing in characterizing the transaction. * * * So where the lawfulness of the method used for transporting goods from one State to another is questioned, it may be shown that the intent of the party concerned was not to select the usual and ordinary method of transportation, but an unusual and more expensive one, for the express purpose of evading or defying the police laws of the state. If the natural result of such method be to render inoperative laws intended for the protection of the people, it is pertinent to inquire whether the act was not done for that purpose, and to hold that the interstate commerce clause of the Constitution is invoked as a cover for fraudulent dealing, and is no defense to a prosecution under the state law. * * * The power of Congress to regulate commerce is undoubtedly a beneficent one. The police laws of the State are equally so, and it is our duty to harmonize them. Undoubtedly a law may sometimes be successfully and legally avoided if not evaded, but it behooves one who stakes his case upon the letter of the Constitution not to be wholly oblivious of its spirit." (Pp. 271.)

112 That a party while doing business by methods appearing to place it under the shield of interstate commerce may at the same time be engaged in violating the state law was conceded in *Adams Express Co. v. Kentucky*, 203 U. S. 129, 137, although it was held by the majority of the court that such facts were not shown. Justice Harlan in a dissent in that and other cases decided with it, stated his belief that they were not cases of legitimate interstate commerce, but showed only devices or tricks to evade or defeat the laws of Kentucky. We understand the majority opinion as assenting to the legal effect of such conduct if proven, differing with Justice Harlan however upon the proof.

It is true that a citizen of Kansas who finds that his business is prohibited by our laws may in good faith engage in the same business in another state where the legal obstacle does not exist. But he may not under the guise of moving across the state line, and other shifts or devices to evade the statutes of the state, continue in the prohibited business here and be immune from the penalties of our law.

From the facts found by the court and from the testimony of the defendant, it appears that his business was not legitimate interstate commerce but was carried on in violation of the statutes of this state and is subject to abatement and injunction.

The judgment of the district court is reversed with instructions to enter judgment for the state as prayed for in the petition.

All the Justices concurring.

A true copy. Attest:

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court.

113 And afterwards, on the 30th day of January, 1913, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas a Petition for a Re-hearing, which Petition is in the words and figures, as follows, to-wit:

114 Filed Jan. 30, 1913. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court of the State of Kansas.

No. 18396.

THE STATE OF KANSAS, Appellant,

VS.

M. KIRMEYER, Appellee.

Petition for Rehearing.

Now comes the appellee M. Kirmeyer, and files this his petition for rehearing and as grounds therefor alleges: (1) The court in its statement and opinion misapprehended the scope and effect of the testimony and misstated portions of the testimony and disregarded the findings of the trial court. (2) The court overlooked or disregarded controlling decisions of the Supreme Court of the United States respecting the right or power of States to prevent the importation and sale of recognized articles of commerce.

As to the Testimony and Findings.

We respectfully submit that the court inadvertently mis-stated parts of the testimony to the prejudice of appellee as follows:

(1) Appellee is quoted as testifying that there was no postoffice at Stillings. This statement of the witness, however, was modified by other parts of his testimony as shown at page 7 of the Counter-Abstract as follows:

"There is no postoffice at Stillings. They bring the mail every morning; the postoffice is a little further down the line there, but the mail carrier brings it every morning."

(2) Appellee is quoted as saying that "sometimes empties were kept in the barn at 117 Delaware street over night where the wagons and teams are kept for making deliveries." Reference to appellee's testimony (Counter-Abstract p. 49) shows that this is a mistake. The witness testified as follows:

"I do not say as a fact within my own knowledge that my drivers keep empty cases in their wagons over night at the barn. I said they may. I could not say for sure. I have no personal knowledge however, of their having done so. They had no orders from me to do that. I have never seen any empties down since I have been in Stillings, except on the wagons, nor in the buildings, but out in the alley, not in the yards but in the alley. The horses were not unhitched. They would come through going over to Stillings. I never saw the wagons down there with empties on in my

time. I never saw them in the wagons when the wagons were unhitched."

115 (3) In the opinion of the court on page 2 it is said:

"When orders were received at this place in Leavenworth by mail he took or sent them into Missouri before even opening them."

The testimony on this point (Counter-Abstract p. 47) is as follows:

Q. "How much of your mail would you say you get over here?"

A. I do not get but very little mail.

Q. You get orders for beer over here?

A. No, sir.

Q. None of them?

A. Oh, they might send in one once in awhile and I would send it back just as I stated this morning—If I think it is a beer order. I can always tell; there is only a few towns I get them from; I cross it off and address it to Stillings.

Q. Why is it you take out of your box a letter which you think contains a beer order and send it to yourself at Stillings and not open it here?

A. I might take it over myself?

We respectfully submit that it is nowhere shown in the testimony, that mail orders were received at "this place in Leavenworth," if it is meant, as the language of the court seems to imply, that there is a place of business at 117 Delaware street.

(4) In the opinion of the court on page 2 it is further said that "empties were handled directly from the Leavenworth place of business to the Leavenworth depot." We think this is not an accurate statement, as it again assumes that there was "place of business" at Leavenworth. The testimony regarding the empties (Counter Abstract p. 6) is as follows:

Q. "Have you any cases stored in Leavenworth?"

A. Why, as we haul them out, we just store them in the freight car as we get them in.

Q. You put those cases back in the car here?

A. Yes, sir.

Q. Have the car stand here until you get it filled?

A. Yes, sir.

Q. Do you go around and gather up the cases and load the car for return to Kansas City?

A. Yes, sir.

Again at page 14 of appellee's abstract and pages 34 and 35 of the transcript the testimony relating thereto shows the contrary and is as follows:

Q. "Mr. Kirmeyer, you take up empties around the city?"

A. The drivers do.

116 Q. You load those on the car here in Leavenworth?

A. I load them here.

Q. You take particular day and go around and gather up a car load of empties, do you?

A. No.

Q. Tell the court just how you do that?

A. The drivers as they go around and see a place where they think there is a case of empties they go and get them and take them to the car.

Q. You don't have a car on the track there until you can take it out?

A. Yes sir.

Q. You pay charges on it?

A. I pay demurrage.

Q. Where do you have that car stationed here?

A. It is in the Great Western Yards.

Q. Down on Choctaw Street?

A. It is a different part."

(5) On page 3 of the opinion the court again assumes that there was a "place of business" in Leavenworth by asking this question: "Why were the letters received by the defendant in person at his place of business in Leavenworth remailed to be again delivered to himself at Stillings, a mile and a half away?"

We respectfully submit that the assumption by the court without any evidence to support it, that the appellee had a place of business in Leavenworth, and that he received mail orders there, was prejudicial to the rights of the appellee.

If in the opinion of the court there is any doubt as to the correctness of the Counter-Abstract, upon the matters above referred to, we ask that the court then refer to the original record showing the testimony, the pages of which record are shown in the Counter-Abstract. We respectfully submit, also, that this court has overlooked or disregarded material findings of the trial court, which findings were in conformity with the only testimony in the case, such for instance as finding No. 6 which among other things finds that no orders were received or accepted by the defendant for liquors in the State of Kansas.

As to the Question of Interstate Commerce.

The court in the opinion admits that the appellee although a citizen of Kansas, has a right to engage in good faith in the liquor business in another state; yet it seems apparent that the fact of being a citizen of Kansas, weighs most heavily against him in the estimation of the court. If a citizen of Missouri received and accepted orders for liquor in his own state from citizens of this state and delivered them in the manner shown by the testimony, would the court feel warranted in ordering that his business be enjoined and his property be declared a nuisance and abated? If
117 any particular act or practice of the defendant or even several of them, be illegal, it would seem sufficient that such acts be enjoined without at the same time enjoining other acts which are entirely consistent with the most rigid rules of interstate business. For instance, if the appellee only receives and accepts orders for his goods in the State of Missouri, can it make any difference how far he is across the line from Leavenworth, or what his inten-

tion was in moving his business to another state? We submit that whether there is one or a hundred liquor houses in Stillings or in any other part of Missouri, does not affect the right of a party to do business there if not contrary to the laws of that state. If the distance from the state line is to determine the bona fides of a business, then where is the line of demarcation? Or if the number of liquor houses at a point in another state or the absence or presence of a post office there is to be a determining factor, what rule is to be followed? Suspicious circumstances may be pointed out against a liquor house close to the line in Kansas City, Missouri and its business enjoined and its property in this state declared a nuisance although it is not shown to have received or accepted orders in this state. And yet if it is many miles from the line, it would probably be free from this suspicion although it did business in the same way.

We respectfully submit that the tests applied by the court in this case are not logical, and rests more upon suspicion than on evidence. The Court rests its decision largely upon the majority opinion in the case of *Austin v. Tennessee* 179 U. S. 343. Four of the judges dissented in that case, and Justice White concurred specially in these words:

"Indeed, as I understand the case as now decided, all the questions adverted to are merged in the solution of the one decisive issue, which is, was each particular parcel of cigarettes an original package within the constitutional import of those words as defined by the previous adjudications of the court? I am constrained to conclude that this question is correctly answered in the negative, not only from the size of each particular parcel, but from all the other surrounding facts and circumstances, among which may be mentioned the trifling value of each parcel, the absence of an address on each, and the fact that many parcels, for the purpose of commercial shipment, were aggregated, thrown into and carried in an open basket. Thus associated in their shipment, they could not, under all the facts and circumstances of the case, after arrival be segregated so as to cause each to become an original package."

118 In the dissenting opinion Judge Brewer called attention to the fact that if a state can assume to pass on the bona fides of inter-state transactions, that power of Congress is largely a dead letter, and among other things said:

"Further may well be quoted the words of Mr. Justice Catron in the *License Cases*, 5 How. 504, 599, quoted with approval in *Bowman v. Chicago & Northwestern Railway*, 125 U. S. 465, 489, and again referred to with like approval in *Leisy v. Hardin*, 135 U. S. 100, 113, and also in *In Re Rahrer*, 140 U. S. 545; 551: "The assumption is that the police power was not touched by the Constitution, but left to the States, as the Constitution found it. This is admitted; and whenever a thing from character or condition, is of a description to be regulated by that power in the State, then the regulation may be made by the State, and Congress cannot interfere. But this must always depend on facts subject to legal ascertain-

ment, so that the injured may have redress. And the fact must find its support in this, whether the prohibited article belongs to and is subject to be regulated as part of foreign commerce, or of commerce among the States. If, from its nature, it does not belong to commerce, or if its condition from putrescence or other cause, is such, when it is about to enter the State, that it no longer belongs to commerce, or in other words, is not a commercial article, then the State power may exclude its introduction. And as an incident to this power, a State may use means to ascertain the fact. And here is the limit between the sovereign power of the State and the Federal power, that is to say, that which does not belong to commerce is within the jurisdiction of the police power of the state; and that which does belong to commerce is within the jurisdiction of the United States. And to this limit must all the general views come, as I suppose, that were suggested in the reasoning of this court in the cases of *Gibbons v. Ogden*, *Brown v. The State of Maryland* and *New York v. Miln*. What, then, is the assumption of the state court? Undoubtedly, in effect, that the State had the power to declare what should be an article of lawful commerce in the particular State; and having declared that ardent spirits and wines were deleterious to morals and health, they ceased to be commercial commodities there, and that then the police power attached, and consequently the powers of Congress could not interfere. The exclusive state power is made to rest, not on the fact of the state or condition of the article, nor that it is property usually passing by sale from hand to hand, but on the declaration found in the state laws, and asserted as the state policy, that it shall be excluded from commerce. And by this means the sovereign jurisdiction in the State is attempted to be created in a case where it did not previously exist. If this be the true construction of the constitutional provision, then the paramount power of Congress to regulate commerce is subject to a very material limitation; for it takes from Congress, and leaves with the States, the power to determine the commodities, or articles of property, which are the subjects of lawful commerce. Congress may regulate, but the States determine what shall or shall not be regulated. Upon this theory the power to regulate commerce, instead of being paramount over the subject, would become subordinate to the state police power; for it is obvious that the power to determine the articles which may be the subjects of commerce, and thus to circumscribe its scope and operation, is, in effect, the controlling one. The police power would not only be a formidable rival, but, in a struggle, must necessarily triumph over the commercial power, as the power to regulate is dependent upon the power to fix and determine upon the subjects to be regulated."

We believe that this case is controlled by the decision in 5 How. 504 above referred to; also by the decisions in *Express Company v. Kentucky* 206 U. S. 139 and by the case of *Express Company v. Kentucky* 214 U. S. 218; also by *Express Company v. Iowa* 196 U. S. 133. In the latter case it was distinctly held that the right of parties making a contract, valid in the state where made, for the sale and purchase of merchandise, carries with

it the right to deliver the same, regardless of the policy or laws of the state where the commodity is delivered.

We respectfully submit that the appellee is entitled to a rehearing of this case.

A. E. DEMPSEY,
F. P. FITZWILLIAMS,
Attorneys for Appellee.

(Endorsed:) State v. Kirmeyer. Petition for Rehearing. Filed Jan. 30, 1913. D. A. Valentine, Clerk Supreme Court. A. E. Dempsey, Attorney-at-law, Leavenworth, Kansas.

120 And afterwards, on the 15th day of February, 1913, the same being one of the regular judicial days of the January Term, 1913, of the Supreme Court of the State of Kansas, in session at the Supreme Court room in the City of Topeka, the following proceeding, among others, was had and entered of record, in the words and figures as follows, towit:

121 In the Supreme Court of the State of Kansas.

Saturday, February 15, 1913.

No. 18396.

THE STATE OF KANSAS, Appellant,
vs.
M. KIRMEYER, Appellee.

Journal Entry Denying Petition for a Rehearing.

Now comes on for decision the petition for a rehearing of this cause; thereupon it is ordered that said petition for a rehearing, be denied.

122 STATE OF KANSAS,
Supreme Court, ss:

I, D. A. Valentine, Clerk of said court, do hereby certify that the above and foregoing contains a true, full and complete transcript of the Record and Proceedings in the case of State of Kansas, Appellant vs. M. Kirmeyer, Appellee. And also of the opinion of the Court, rendered therein as the same now appears on file in my office.

In testimony whereof, I hereunto set my hand and affix the seal of said Court at my office in Topeka, Kansas, this 17th day of March, 1913.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court of Kansas.

123 Here follows:
Original Petition for Writ of Error and Assignments of Error.

Original Writ of Error, together with the Allowance thereof.

The Journal Entry of Allowance of said Writ and the fixing of the Appeal Bond.

A copy of the Appeal and Supersedeas Bond.

The Original Citation and Proof of Service thereof, and the Precipe for the making of the Transcript of the Record.

124 In the Supreme Court of the State of Kansas.

M. KIRMEYER, Plaintiff in Error,

vs.

THE STATE OF KANSAS, Defendant in Error.

Petition for Allowance of Writ of Error.

To the Honorable W. A. Johnson, Chief Justice of the Supreme Court of the State of Kansas:

The petition of the plaintiff in error, M. Kirmeyer, respectfully shows: that heretofore to-wit, upon the — day of July, 1912 there was tried in the District Court of Leavenworth County, Kansas a case wherein the State of Kansas was plaintiff and your petitioner was defendant. The petition of the plaintiff in said cause was for injunction against defendant to enjoin and restrain him from carrying on his business, to-wit, that of wholesale dealer in beer; that said petition alleges that the defendant is a citizen of the State of Kansas, engaged in the sale and delivery of intoxicating liquors in the city and county of Leavenworth in said state of Kansas and is operating a warehouse, shift or device at the Town of Stillings, Platte County, State of Missouri, across the Missouri river from Leavenworth, at which place the defendant is unloading and storing intoxicating liquors for the unlawful purpose of selling the same within the city and county of Leavenworth in the State of Kansas, and for that purpose is employing upon the streets and alleys of the city of Leavenworth, certain wagons and vehicles for carrying intoxicating liquors across the Missouri river and selling the same to persons in the city and county of Leavenworth, Kansas; that defendant maintains telephones at his store room or warehouse at Stillings, Missouri, which telephones are connected with residences and places of business within the city and county of Leavenworth, over which

125 telephones the defendant takes and receives orders for liquors at his storeroom or warehouse in Stillings, Missouri, and thereafter sells and delivers the same to persons in the city and county of Leavenworth, Kansas, in violation of the prohibitory laws of the latter state; that defendant collects the sale price of said liquors so delivered upon telephone orders as aforesaid; that the defendant maintains local city telephones at his residence, number 702 North Third Street in the city of Leavenworth, Kansas, over

which he receives orders for liquors and delivers same by means of the conveyances above mentioned from his warehouse in the State of Missouri; that the defendant authorizes and permits the drivers of said vehicles to take and solicit orders for liquors in the city and county of Leavenworth, State of Kansas and thereafter deliver the liquors to persons within the latter state and uses the streets and alleys of said city of Leavenworth for that purpose; that the defendant keeps said conveyances in the city of Leavenworth loaded overnight with intoxicating liquors which are next morning delivered to persons within the city of Leavenworth, in the State of Kansas, and the sale price thereafter collected within the city and county of Leavenworth, State of Kansas; that many of the persons to whom the defendant sells liquors are engaged in the unlawful selling of the same within the State of Kansas, which practice is known to the defendant; that the defendant pretends to be engaged in interstate commerce, but is not so bona fide engaged, but is conducting his business wholly within the State of Kansas; that the defendant receives his liquors at his warehouse in the State of Missouri in original packages, and thereafter sells and delivers them to persons in the city and county of Leavenworth, State of Kansas, in other than original packages; that defendant keeps and maintains warehouses and storerooms within the city of Leavenworth for storing intoxicating liquors and empty cases, bottles, casks and barrels and for stabling his wagons loaded with intoxicating liquors, and for stabling and caring for his teams used in the transportation of liquors from Stillings, Platte County, Missouri. Said petition prays that the defendant be enjoined and restrained from conducting his said business and from maintaining, using and employing said conveyances, wagons, horses, mules, telephones and any other property in the manner therein alleged and that said wagons, 126 conveyances, horses, mules, telephones, and other property be declared common nuisances, and be abated, and that the plaintiff recover the sum of \$500.00 for attorney's fees.

Your petitioner shows that he filed his answer to said petition in said cause denying each all and every allegation or averment of said petition and for further defense the defendant averred that he has and keeps a whole-sale liquor business in the town of Stillings, Platte County, Missouri, which place of business he has kept for some years past, in which state of Missouri and under the laws thereof the sale and delivery of intoxicating liquors is a legitimate and lawful business, and that a large part of defendant's business is done with residents of the State of Kansas and other States, in which transactions the defendant sells in the State of Missouri to residents of other States, beer and liquor and causes deliveries thereof to be made in original boxes, bottles and packages across the state line to purchasers in good faith in pursuance of sales made in the State of Missouri, and that under Section 8 of Article 1 of the Constitution of the United States, he has a legal right to so engage in interstate commerce, and to make sales and deliveries of beer and liquor in the manner aforesaid.

Your petitioner further shows that upon the trial of the issues

before the District Court of Leavenworth County, Kansas, said court did on July 15, 1912, make and file certain statement of facts and conclusions of law; that it was found by said court that your petitioner is a citizen and resident of the City of Leavenworth and State of Kansas, and is a dealer in beer and malt liquors; that about 1907 prior to moving his office and place of business to the town of Stillings, in the State of Missouri, which is located about one and one half miles east of the city of Leavenworth, the defendant had a place of business, warehouse and barn at 8th and Cherokee Streets in the city of Leavenworth, Kansas, and had both telephones number 313 at said location; that about three years prior to the institution of this action, the defendant moved his place of business from Leavenworth, Kansas, to said town of Stillings, in the State of Missouri, where he has ever since kept and maintained his place of business and warehouse, at which point he receives beer in 127 car load lots and stores it in said warehouse in the town of Stillings, Missouri, for sale and delivery; that the defendant pays the license tax required by the general government from those engaged in such business in Platte County, Missouri, and pays a merchant's tax in Platte County, Missouri, and also pays a general tax on the value of the property including beer in his warehouse, located in Stillings, Missouri, and that the defendant has no malt or liquor dealer's license to sell liquor in the State of Kansas; that the defendant has both telephones at his office in Stillings, Missouri, which are connected with the telephone exchanges in the city of Leavenworth, Kansas, and he receives and accepts at his place of business in Stillings, Missouri, orders by telephone and by mail from persons in Kansas, Oklahoma, Missouri and other states, for beer; that persons desiring to purchase beer from the defendant transmit their orders to the defendant at his place of business in Stillings, Missouri, by mail or telephone, which orders if accepted, are filled by selecting from his stock of beer in his warehouse, and setting aside the beer in kegs, casks, cases or bottles as ordered, on which is placed a shipping tag or label containing the name of the person to whom, and the place where, the same is to be delivered, and delivery is made to the person at the place named on said tag or label, in the original packages in which the orders are placed, either by deliverymen engaged in such business, or by employee of the defendant with teams and conveyances owned or employed by the defendant for that purpose, and that no orders are received or accepted by the defendant within the State of Kansas; that those engaged in making deliveries to purchasers in Kansas do not collect from the purchaser at the time of making such deliveries; that they do not make sales or solicit orders; that sometimes the purchaser remits the price of the beer by mail after it has been delivered, and sometimes the defendant collects from his customers and other times he employs a collector; that occasionally he sends a statement by a driver to persons in the outskirts of the city where it is not convenient for himself or his collector to go, but that no C. O. D. collections or shipments are made; that the defendant

does what is known as a family trade, selling and delivering
128 his beer to private families for private use; that at the time the defendant moved his place of business to Stillings, Missouri, he removed his teams and wagons to No. 117 Delaware Street in the city of Leavenworth, in the State of Kansas, where he caused to be installed his telephones No. 313, and he has there kept his wagons and teams at night and such other times as they are not in use; that occasionally when defendant is at his stables, and any person wanting beer happens to call up at that number, he does not receive or accept the order, but directs them to call up his place of business at Stillings, Missouri; that the only railroads running through or near the town of Stillings, Missouri, are the Burlington, the Chicago, Rock Island Pacific, and the Chicago Great Western, which have a freight depot, but no regular station agent; that the Burlington has in some instances, received shipments of beer from that point to be delivered in the State of Kansas or elsewhere; that the beer purchased by the defendant from the Rochester Brewing Company of Kansas City, Missouri, is delivered to him at Stillings, Missouri, by railroad in carload lots, except in a few instances where it is shipped to him over the Missouri Pacific Railway, consigned to Leavenworth, Kansas, and is there received by him and carried to his place of business in Stillings, Missouri, and placed in his warehouse, and that most of the beer so received is for defendant's Platte County, Missouri, trade; that sometimes when orders are received from points in Kansas or other states by the defendant at his place of business in Stillings, Missouri, and shipments cannot be made by common carriers directly from the latter point, the defendant places the name and address of the consignee upon the case, cask or keg at his place of business in Stillings, Missouri, loads the same upon his wagons, and delivers them to the depot of some common carrier in the city of Leavenworth, Kansas, which has a line of railway reaching the point from which the order is received, and that a bill of lading is signed and delivered by the agents of the railway company to the driver, at Leavenworth, Kansas, and the case, cask or keg is transported by the railroad company to the station designated on the label or tag on said case, cask or keg to be delivered to the consignee named on the tag or
129 label; that ever since the defendant has been in said business he has carried an advertisement in a small weekly newspaper of limited circulation in the city of Leavenworth, Kansas, which reads: "Michael Kirmeyer, Stillings, Missouri. Rochester Beer. Family Trade Especially. Phones 313." That at the time defendant moved his place of business to Stillings, Missouri, he through oversight failed to have the telephone numbers changed and said advertisement has ever since run in said newspaper as also a similar advertisement in another weekly newspaper of limited circulation called the "German Tribune"; that no orders for beer are or have been received or accepted by the defendant at either telephones 313 since moving his warehouse and place of business to Stillings, Missouri; that occasionally mail orders have been addressed to defendant at Leavenworth, Kansas, instead of Stillings, Missouri, but

when received by him have been remailed, taken or sent to his place of business at Stillings, Missouri, before being opened or accepted. That when orders for beer were received and accepted by the defendant at his place of business in Stillings, Missouri, the cases are there set aside and tagged or labeled with the name and address of the consignee and are thus delivered by the defendant in his own conveyances or by common carriers, in the city of Leavenworth, Kansas, the empty cases and bottles charged to the purchaser, and are afterwards gathered up by the defendant with his own teams and wagons, and loaded in a freight car placed for that purpose in the freight yards in the city of Leavenworth, Kansas, and shipped out of the state; that when cases are thus gathered up, the purchaser is given credit therefor.

That no reason has been given in the evidence why the defendant maintains his stable at 117 Delaware Street in Leavenworth, Kansas, and keeps his wagons and teams therein, nor why he continues to live in the city of Leavenworth, Kansas, instead of the State of Missouri; but from all the evidence it appears that such horses and vehicles are kept by the defendant in the city of Leavenworth, Kansas, because he himself lives there, and it is more convenient for him to stable his teams and horses on the Kansas side of the river. That the defendant's residence in the city of Leaven-

130 worth, Kansas, and the keeping by him of his teams and wagons used by him in his said business, is not intended as a subterfuge, or a shift or device on his part to circumvent or defeat the prohibitory laws of the State of Kansas, and neither is the fact that mail is occasionally addressed to him at Leavenworth, Kansas, instead of Stillings, Missouri, nor the fact that he maintains telephones at his stable in the city of Leavenworth, Kansas, and advertises in said papers, intended by him as a shift and none of these circumstances actually tend to circumvent or defeat the laws of the State of Kansas; that about 85% of the orders received by the defendant at his place of business in Stillings, Missouri, from persons in the city of Leavenworth, Kansas, are received over his telephone at Stillings, Missouri; that a railroad and wagon bridge spans the Missouri river at the city of Leavenworth, Kansas, and about a mile from the town of Stillings, Missouri, over which the defendant crosses in delivering beer to railroad depots and to persons in the city of Leavenworth; that he pays the regular tolls charged by the bridge company; that in delivering his beer as aforesaid the defendant uses the streets and alleys of the city of Leavenworth, Kansas, by driving his teams thereover and thereon, and allows and permits his teams and wagons to stand and remain on the public streets and alleys while the beer is taken from the wagons and delivered on the premises of the persons named on the tag or label on the case, cask or keg containing the beer; but no delivery is made on any of the public streets or alleys to any person or persons thereon."

Your petitioner states that upon the foregoing facts the trial court found as a conclusion of law that the sale and delivery of beer by the defendant to persons in the State of Kansas and other states,

constitutes and is interstate commerce, and is within the scope and protection of Section 8 of Article 1 of the Constitution of the United States.

Thereafter and on July 20, 1912, judgment was entered by the trial court for the defendant, awarding him his costs therein incurred.

Your petitioner further states that thereafter the State of Kansas took an appeal from said judgment of the District Court
131 of Leavenworth County, Kansas, to the Supreme Court of the State of Kansas, that being the highest court of law or equity of the said State in which a decision could be had in said case, assigning therein as error the findings of fact, conclusions of law, and judgment of the District Court of Leavenworth County, Kansas, and upon review of said findings and judgment and to-wit, on January 11, 1913 the Supreme Court of the State of Kansas reversed said judgment and directed the District Court of Leavenworth County, Kansas, to enter judgment for the State as prayed for in its petition.

Your petitioner further states that he thereupon filed a petition in the Supreme Court of Kansas, for a rehearing, which petition for rehearing was on February 15, 1913, denied by said Supreme Court.

Your petitioner respectfully states that the pleadings, the evidence, the findings and the judgment herein shows that ground of defense raised and presented a federal question in this case, namely: that the defendant at and for many years before the commencement by the State of this suit for injunction, was engaged in interstate commerce, and his business is and was protected under Section 8, of the Article 1 of the Constitution of the United States.

Your petitioner further respectfully shows that the findings of the trial court show that the defendant's office and place of business is in the town of Stillings, in Platte County, in the State of Missouri, where he receives and accepts orders for beer and delivers the same to persons in the State of Kansas and other States pursuant to orders received and accepted by him in the State of Missouri as he has a legal right to do under the commerce clause of the Federal Constitution.

Your petitioner further shows that the judgment of the Supreme Court of the State of Kansas, reversing the judgment of the District Court of Leavenworth County, Kansas, is repugnant to and in conflict with, Section 8 Article 1 of the Constitution of the United States, and that a decision of a federal question was necessary to the judgment rendered.

Your petitioner further shows that said judgment of said Supreme Court was and is a final judgment of the highest court of the
132 State of Kansas in which a decision in said suit could or can be had.

Your petitioner respectfully submits:

(1) That the court erred in holding that General Statutes of Kansas 1909, paragraphs 4362 and 4365 has any application to the facts of this case.

(2) The court erred in holding that General Statutes of Kansas 1909 paragraph 4372 has any application to the facts of this case.

(3) The court erred in holding that the General Statutes of Kansas 1909 paragraphs 4387 and 4388 have any application to the facts of this case.

(4) The court erred in holding that because the plaintiff had engaged in the liquor business in Kansas prior to his moving his place of business to Missouri, was evidence of his subsequent violation of the state law, and in basing its judgment in whole or in part upon that circumstance.

(5) The court erred in holding that because the petitioner moved his place of business to the State of Missouri about the time of the appointment of receivers in prosecutions against brewers, is evidence of violations of the state liquor law, and the court further erred in basing its judgment thereon, in whole or in part.

(6) The court erred in holding that because the petitioner's warehouse is located in Missouri, convenient to the Kansas line, is evidence of petitioner's violation of the liquor laws of the state of Kansas, and the court further erred in basing its judgment thereon either in whole or in part.

(7) The court erred in holding that because there are eight or ten other liquor warehouses at Stillings, Missouri, convenient to the Kansas line, and no station agent or postoffice, is a circumstance tending to show petitioner's violation of the prohibitory laws of Kansas, and the Court further erred in basing its judgment in whole or in part, upon that circumstance.

(8) The court erred in holding that because the petitioner moved his place of business across into Missouri, and leased a place in Leavenworth and equipped it with telephones, quartered his
133 teams and wagons there, and continued to use his teams and conveyances in making deliveries of beer from his place of business in Missouri, is a violation or evasion of the prohibitory laws of the State of Kansas and the court further erred in basing its judgment, in whole or in part, upon that circumstance.

(9) The court erred in holding that occasional receipt of mail orders by the petitioner at Leavenworth, Kansas, and re-mailing or sending them into Missouri before opening them, is a violation or evasion of the laws of the State of Kansas, or is a circumstance tending to show such evasion or violation, and in basing its judgment in whole or in part thereon.

(10) The court erred in holding that because occasional applicants for beer called up telephones No. 313, being the number of this petitioner's stables in Leavenworth, Kansas, and were directed to call up across the river, is a violation or evasion of the laws of the State of Kansas, and the court further erred in basing its judgment, in whole or in part, upon that circumstance.

(11) The court erred in denying petitioner's right to gather up empty beer cases and bottles of shipments made from Missouri, and load them into a freight car in the freight yards or depots at Leavenworth, Kansas, and in holding that the same constitutes a violation

or evasion of the laws of the State, authorizing injunction as prayed for by the State.

(12) The court erred in holding that orders received and accepted by the petitioner in the State of Missouri, for shipments of beer to points in Kansas, could not be sent or delivered by him in the State of Kansas, nor deliveries made to freight depots at Leavenworth, Kansas for shipment to consignees in Kansas and that such acts were in violation or evasion of the State laws and should be enjoined.

(13) The court erred in holding in effect that the petitioner had no right to receive orders at his place of business in Missouri, and there label the kegs and receptacles and deliver the same by his own teams in Leavenworth, Kansas, and that such deliveries were an evasion of the State Laws.

134 (14) The court erred in holding in effect that said acts, singly or collectively, were an evasion of the laws of the State of Kansas, and should be enjoined.

(15) The court erred in holding that said acts, were a shift or device, to evade the prohibitory laws of the State of Kansas.

(16) The court erred in holding that said acts warranted injunction against petitioner carrying on his business in the State of Missouri, as shown by the findings of fact, and from *and* accepting orders there and delivering beer so ordered, to residents of the State of Kansas.

(17) The court erred in holding that the petitioner was not engaged in legitimate interstate commerce.

(18) The court erred in picking out isolated instances of suspicious or alleged unlawful acts, and making the same the basis for enjoining other and legal acts and prohibiting all of the petitioner's interstate business with persons in the State of Kansas.

(19) The court erred in holding that the petitioner had no right to store beer across the State line, to be afterward delivered in Kansas, or to re-mail letters from the State of Kansas to himself in the State of Missouri, or to direct persons wishing beer to call up across the State line, and the court further erred in making these facts the basis for enjoining all of the business of the petitioner, done with persons in Kansas.

(20) The court erred in denying the right of petitioner to enter into contracts in Missouri for the delivery of liquor in the State of Kansas, and in enjoining such delivery.

(21) The court erred in directing writ of injunction to prohibit shipments of beer from the State of Missouri, which shipments were and are made in pursuance of valid contracts entered into in the State of Missouri.

(22) The court erred in directing injunction against the use of your petitioner's teams, wagons, conveyances, telephones and other personal property in carrying on his business in and from the State of Missouri, and in declaring such articles of personal property to be common nuisances, and ordering their abatement.

(23) The court erred in holding that the injunction so directed does not deprive the petitioner of his rights under the Constitution

of the United States to engage in or carry on interstate commerce.

135 (24) The court erred in holding that the injunction directed by it, does not interfere with petitioner's constitutional right to enter into contracts in the State of Missouri for the sale and delivery of beer in the State of Kansas.

(25) The court erred in holding that the writ of injunction and abatement directed by it is not in violation of Section 8 of Article 1 of the Constitution of the United States, which confers on Congress the exclusive power to regulate commerce among the several states.

(26) The court erred in directing judgment to be entered in conformity with the prayer of the petition filed by the State.

(27) The court erred in denying petitioner's application for a rehearing.

Wherefore the petitioner prays that a writ of error from the Supreme Court of the United States may issue to the Supreme Court of the State of Kansas and further prays that the Supreme Court of the United States will reverse the said final order and judgment of the Supreme Court of the State of Kansas; that the bond herewith presented be approved, and the writ of error operate as a supersedeas.

M. KIRMEYER, *Petitioner.*

A. E. DEMPSEY,

F. V. FITZWILLIAM,

Attorneys for M. Kirmeyer, Petitioner.

The writ of error as prayed for in the foregoing petition is hereby allowed this 24th day of February, A. D., 1913, the writ of error to operate as a supersedeas and the bond for this purpose is fixed at the sum of \$3,000.00.

Dated at Topeka, this 24th day of February, A. D., 1913.

W. A. JOHNSTON.

*Chief Justice of the Supreme Court
of the State of Kansas.*

136 [Endorsed:] No. 18396. The State of Kansas, Appellant, vs. M. Kirmeyer, Appellee. Petition for Allowance of Writ of Error to Supreme Court of the United States. Filed Feb. 24, 1913. D. A. Valentine, Clerk Supreme Court. A. E. Dempsey, Attorney at Law, Leavenworth, Kansas.

137

In the Supreme Court of the State of Kansas.

M. KIRMEYER, Plaintiff in Error,

vs.

THE STATE OF KANSAS, Defendant in Error.

*Writ of Error from the Supreme Court of the United States to the
Supreme Court of the State of Kansas.*

THE UNITED STATES OF AMERICA, *ss.*:

The President of the United States of America to the Honorable
the Judges of the Supreme Court of the State of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of
the judgment, of a plea, which is in The said Supreme Court of the
State of Kansas, before you, being the highest court of law and
equity in said state, in which a decision could be had in the suit
between M. Kirmeyer, plaintiff in error, and, The State of Kansas,
defendant in error, wherein was drawn in question the construction
of a clause of the Constitution of The United States, being
Section 8 of Article I, of the Constitution of The United States of
America, and the decision was against the right and privilege
specially set up and claimed under such clause of the said constitution,
a manifest error hath happened to the great damage of the
said M. Kirmeyer, as by his complaint appears, we being willing
that error, if any hath been, should be duly corrected, and full and
speedy justice done to the party aforesaid in this behalf, do command
you if judgment be therein given, that then under your seal,
distinctly and openly, you send the record and proceedings aforesaid,
with all things concerning the same, to the Supreme Court of The
United States, together with this writ, so that you have the same at
Washington on the 26th day of March A. D. 1913, in the said
Supreme Court, to be then and there held, that, the record and
proceedings aforesaid, being inspected, the said Supreme

138 Court may cause further to be done therein, to correct that
error, what of right and according to the laws and customs
of the United States should be done.

Witness the Hon. Edward Douglass White, Chief Justice of the
said Supreme Court, the 24th day of February in the year of our
Lord One Thousand Nine Hundred and Thirteen.

[Seal of District Court U. S., District of Kansas, 1861.]

MORTON ALBAUGH,

*Clerk of the District Court of the United States
of America for the District of Kansas.*

Allowed by—

W. A. JOHNSTON,

*Chief Justice of the Supreme Court
of the State of Kansas.*

139 [Endorsed:] 18396. In the Supreme Court of the State of Kansas. M. Kirmeyer, Plaintiff in Error, vs. The State of Kansas, Defendant in Error. Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Kansas. Filed Feb. 26, 1913. D. A. Valentine, Clerk Supreme Court. A. E. Dempsey & F. P. Fitzwilliam, Attorney- for Plaintiff in Error.

140 In the Supreme Court of the State of Kansas.

M. KIRMEYER, Plaintiff in Error,

vs.

THE STATE OF KANSAS, Defendant in Error.

Order Allowing Writ of Error from the Supreme — of the United States to the Supreme Court of the State of Kansas.

The above entitled matter coming on to be heard upon the petition of the plaintiff in error there for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Kansas, and upon examination of said petition and the record in said matter and desiring to give the petitioner an opportunity to present in the Supreme Court of The United States the questions presented by the record in said matter.

It is ordered that a writ of error be and is hereby allowed to this court from the Supreme Court of The United States and the bond presented by said petitioner be and the same is hereby approved.

W. A. JOHNSTON,

*Chief Justice of the Supreme Court
of the State of Kansas.*

141 [Endorsed:] 18396. In the Supreme Court of the State of Kansas. M. Kirmeyer, plaintiff in error, vs. The State of Kansas, defendant in error. Order allowing writ of error from the Supreme Court of the United States to the Supreme Court of the State of Kansas. Filed Feb. 24, 1913. D. A. Valentine, Clerk Supreme Court. A. E. Dempsey & F. P. Fitzwilliam, attorneys for plaintiff in error.

142 In the Supreme Court of the State of Kansas.

M. KIRMEYER, Plaintiff in Error,

vs.

THE STATE OF KANSAS, Defendant in Error.

Bond on Writ of Error from Supreme Court to State Court.

Know all men by these presents:

That we, M. Kirmeyer, as principal, and O. Giacomini and F. C. Schulte as sureties, are held and firmly bound unto The State of Kansas in the sum of Three Thousand (\$3,000.00) Dollars, to

be paid to the obligee, its proper offices and representatives; to the payment of which well and truly to be made we bind ourselves, our heirs executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 24th day of February, A. D. 1913.

Whereas, the above named plaintiff in error hath prosecuted a writ of error in the Supreme Court of the United States to reserve the judgment rendered in the above entitled action by the Supreme Court of The State of Kansas.

Now therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute his said writ of error to effect and answer all costs and damages, if he shall fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and effect.

M. KIRMEYER,
Principal.
O. GIACOMINI,
F. C. SCHULTE,
Sureties.

143 STATE OF KANSAS,
Leavenworth County, ss:

On this 24th day of February, A. D. 1913, before me, personally appeared O. Giacomini and F. C. Schulte to me known to be the persons described in and who executed the foregoing bond, as sureties, and acknowledged that they, each respectively, executed the same as their free act and deed, and each respectively stated that they each are worth the sum of Three Thousand (\$3,000.00) Dollars, over and above their just debts and liabilities and exclusive of all exemptions.

O. GIACOMINI,
F. C. SHULTE.

Subscribed and sworn to before me this 24th day of February, A. D. 1913.

My commission expires September 1913.

W. P. WETTIG,
Notary Public.

I hereby approve the foregoing bond and sureties this 24th day of February, A. D. 1913.

W. A. JOHNSTON,
*Chief Justice of the Supreme Court
of The State of Kansas.*

[Endorsed:] 18396. In the Supreme Court of the State of Kansas. M. Kirmeyer, Plaintiff in Error, vs. The State of Kansas, Defendant in Error. Bond on Writ of Error from Supreme Court to State Court. Filed Feb. 24, 1913. D. A. Valentine, Clerk Supreme Court.

144 In the Supreme Court of the State of Kansas.

M. KIRMEYER, Plaintiff in Error,
vs.
THE STATE OF KANSAS, Defendant in Error.

*Citation to Defendant in Error in the Above Cause Removed to the
Supreme Court of the United States.*

THE UNITED STATES OF AMERICA, ss:

To the State of Kansas, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of The United States, at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of The State of Kansas, wherein M. Kirmeyer, is plaintiff in error, and, you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the party in that behalf.

Witness, the Honorable W. A. Johnston, Chief Justice of the State of Kansas, this 24th day of February, A. D. 1913.

[Seal Supreme Court State of Kansas.]

W. A. JOHNSTON,
*Chief Justice of the Supreme Court
of The State of Kansas.*

Attest:

D. A. VALENTINE,
Clerk Supreme Court.

Copy of the within citation received this 24th day of February, A. D. 1913, at the office of the Attorney General of The State of Kansas.

JOHN S. DAWSON,
Attorney General.

By _____,
Assistant Attorney General.

145 [Endorsed:] 18396. In the Supreme Court of the State of Kansas. M. Kirmeyer, plaintiff in error, vs. The State of Kansas, defendant in error. Citation to Defendant in Error in the above cause removed to the Supreme Court of the United States. A. E. Dempsey & F. P. Fitzwilliam, attorneys for plaintiff in error. Filed Feb. 24, 1913. D. A. Valentine, Clerk Supreme Court.

146 In the Supreme Court of the State of Kansas.

M. KIRMEYER, Plaintiff in Error,

vs.

THE STATE OF KANSAS, Defendant in Error.

Præcipe for Portions of the Record to be Incorporated in the Transcript of the Record to be Sent to the United States Supreme Court on Writ of Error.

To D. A. Valentine, Clerk of the Supreme Court of The State of Kansas.

SIR: Please, in making your transcript of the record, for the Supreme Court of The State of Kansas, in the above entitled case, incorporate in such transcript such parts of the record, to-wit: The petition in error; the assignments of error; the citation; the writ of error; the bond; the abstract of the evidence of the appellee; the abstract of the evidence and proceedings filed by the appellant in the Supreme Court; the judgment rendered by the Supreme Court in such action; the opinion of the court; the motion for a rehearing; the order denying the same; the order allowing the writ of error and approving the bond; all to be attached to your return on the writ of error; also have your certificate to show that service of the writ was made on the defendant in error, by lodging a copy thereof in your office before the return day; and set forth a copy of the præcipe, in the transcript, filed with you; and file your return before the expiration of thirty (30) days from the 24th day of February, A. D. 1913.

Dated this 25th day of February, A. D. 1913.

A. E. DEMPSEY &

F. P. FITZWILLIAM,

Attorneys for Plaintiff in Error.

147 Service of the above præcipe is hereby acknowledged to have been made upon me this 26th day of February, A. D. 1913.

JOHN S. DAWSON,

Attorney General of The State of Kansas,

Attorney for Defendant in Error.

148 [Endorsed:] 18396. In the Supreme Court of the State of Kansas. M. Kirmeyer, plaintiff in error, vs. The State of Kansas, defendant in error. Præcipe for portions of the record to be incorporated in the transcript of the record to be sent to the United States Supreme Court on Writ of Error. Filed Mar. 6, 1913. D. A. Valentine, Clerk Supreme Court. A. E. Dempsey & F. P. Fitzwilliam, attorneys for plaintiff in error.

149 STATE OF KANSAS,
 Supreme Court, ss:

I, D. A. Valentine, Clerk of said Court do hereby certify that there was lodged with me as such clerk on February 24th, 1913, in the above entitled case:

1. The original bond, of which a copy is herein set forth.
2. Two copies of the Writ of Error as herein set forth, one for the defendant, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court at my office in Topeka, Kansas, this 17th day of March, 1913.

[Seal Supreme Court State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court of Kansas.

150 UNITED STATES OF AMERICA,
 Supreme Court of Kansas, ss:

In obedience to the commands of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of the said Supreme Court of Kansas in the City of Topeka, this 17th day of March, 1913.

[Seal Supreme Court State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court of Kansas.

Endorsed on cover: File No. 23,632. Kansas Supreme Court. Term No. 145. M. Kirmeyer, plaintiff in error, vs. The State of Kansas. Filed April 14th, 1913. File No. 23,632.



No. 145.

Office Supreme Court, U.S.

FILED

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JAMES D. MAHER

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1914.

M. KIRMEYER, PLAINTIFF IN ERROR,

VS.

THE STATE OF KANSAS, DEFENDANT IN ERROR.

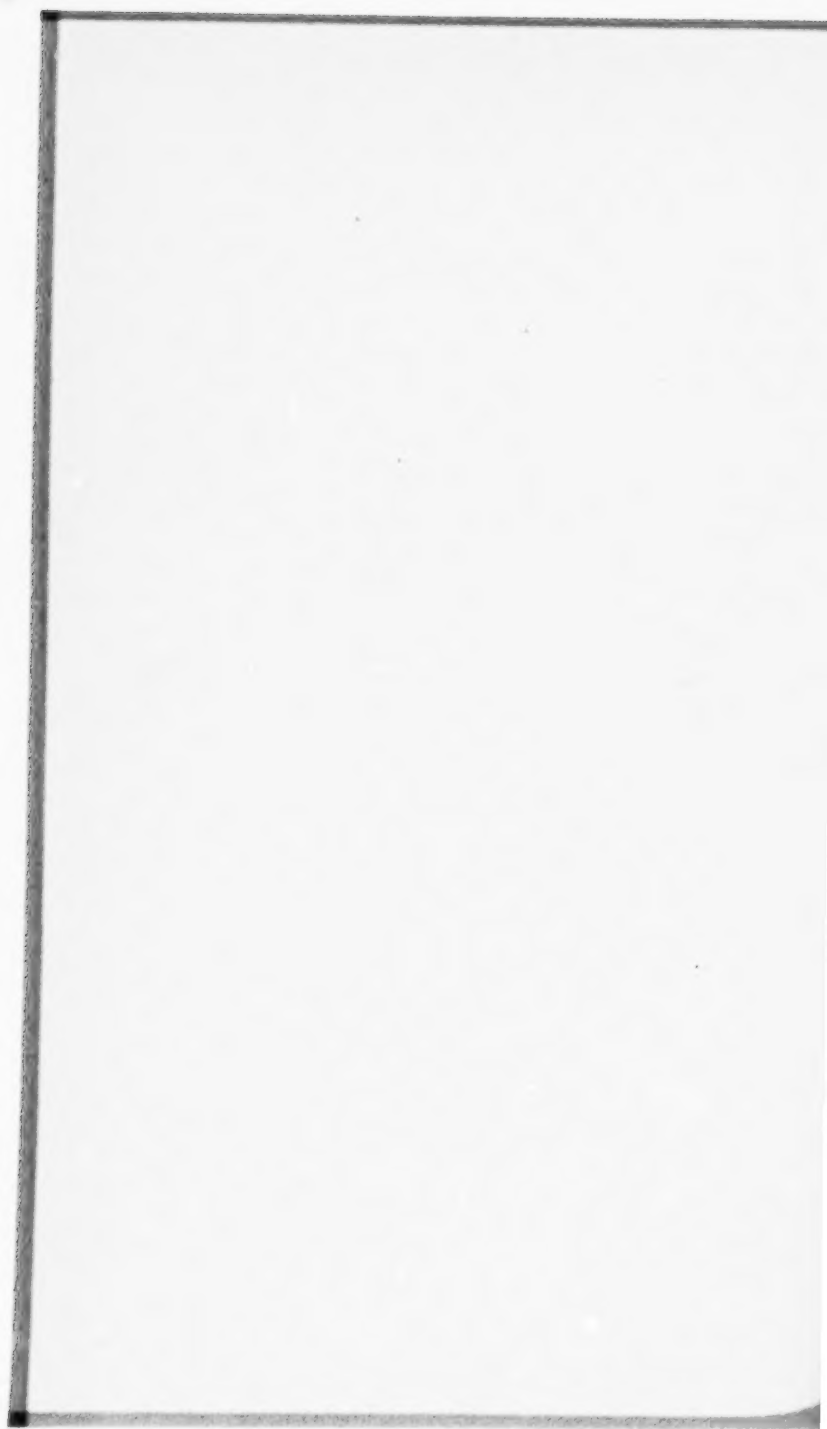
IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF OF PLAINTIFF IN ERROR.

A. E. DEMPSEY,

Attorney for Plaintiff in Error.

FRANK DOSTER,
Of Counsel.



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No. 145.

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1914.

M. KIRMEYER, PLAINTIFF IN ERROR,

VS.

THE STATE OF KANSAS, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

STATEMENT OF CASE.

This is an action brought September 29, 1910, by the State of Kansas against M. Kirmeyer in the District Court of Leavenworth County, Kansas, to enjoin and abate an alleged liquor nuisance. Findings were made and judgment was entered in favor of defendant Kirmeyer, July 20, 1912, by the trial court, from which the State took an appeal to the Supreme Court of Kansas, and on January 11, 1913, the latter court reversed the trial court and ordered judgment to be entered against the defendant as prayed for in the amended petition of the State. From this judgment and ruling of the Supreme Court of Kansas, Kirmeyer prosecutes error.

The Amended Petition.

The amended petition of the State upon which this case was tried is quite long, embracing as it does, some sixteen paragraphs exclusive of the prayer, much of which is surplusage and repeti-

tion. It is set forth in full at pages 4 to 8 of the printed record herein and in substance charges as follows, the paragraphs being noted in brackets:

(1) That defendant is a citizen of Kansas; (2) that he is engaged in the liquor business; (3) that he maintains a warehouse at Stillings, Platte County, Mo., and is "temporarily" unloading and storing intoxicating liquors thereat with the unlawful intent of selling them in Leavenworth County, Kansas; (4) that he carries the liquor across the river from Missouri and uses the streets of Leavenworth with his vehicles in there selling and delivering it to various persons with the purpose of aiding and abetting "many of said persons" in violating the law; (5) that he maintains a telephone at his storeroom in Stillings, Mo., which is connected with residences in Leavenworth, over which he takes and receives orders for liquor and "thereafter" sells and delivers the liquors to residences and persons "wholly and entirely within" the city and county of Leavenworth; (6) that it is the "unlawful custom" of the defendant to collect the sale price of the liquors so delivered upon telephone orders aforesaid "wholly and entirely within" the city and county of Leavenworth; (7) that the defendant has a telephone at his residence in the city of Leavenworth over which he received orders for liquors and thereafter delivers same from his warehouse in Missouri and "thereafter collects the sale price wholly within" said city and county of Leavenworth; (8) that he directs and allows his employes to solicit and receive orders for liquor "wholly within" the city and county of Leavenworth and delivers such orders from his storeroom or shift or device at the town of Stillings and from said wagons on the streets and alleys of Leavenworth; (9) that he keeps his conveyances, horses and drivers within the city and county of Leavenworth, especially at night, and that frequently said conveyances are kept loaded over night with liquor and delivered next morning within the city of Leavenworth, and "the price thereafter collected wholly within" the city of Leavenworth; (10) that a large part of the persons to whom such intoxicating liquors are sold "are thereafter selling" and delivering said intoxicating liquors in violation of law, which defendant well knows, and he is and has been so selling and delivering liquors "for the express and unlawful purpose" of aiding and abetting in the violation of law; (11) that defendant has adopted and is using his so-called warehouse in Stillings, Mo., and

his wagons, teams, drivers, telephone, etc., simply as devices, shifts and subterfuges to avoid and violate the law; (12) that the defendant pretends to be engaged in interstate commerce, but is conducting his unlawful business "wholly within" said State of Kansas, and is not *bona fide* engaged in interstate commerce; (13) that defendant receives liquors at his so-called storeroom in Stillings, Mo., "in original packages," and the liquors are there "taken out of said original packages" and sold and delivered to persons and residences in the city and county of Leavenworth "in other than original packages"; (14) that unless restrained, defendant will continue in violation of law; (15) that the defendant keeps in the city and county of Leavenworth certain warehouses and storerooms for the purpose of selling and storing intoxicating liquors and empty cases, bottles and barrels, and for the purpose of stabling wagons loaded with intoxicating liquors, and for the purpose of stabling teams used in transportation of liquors from Stillings, Mo.

The Answer.

The answer of Kirmeyer is shown at page 8 of the printed transcript of the record herein, and contains (1) a general denial, (2) alleges that he is a wholesale liquor dealer in the town of Stillings, Platte County, Missouri, and does an interstate business, receiving and accepting orders at his said place of business, and delivering such orders in original packages to consignees in Kansas and other states; that under the laws of Missouri, the wholesale liquor business is a lawful one and that defendant's right to sell in that state and deliver liquor in pursuance of such sales to citizens of Kansas and other states is protected by the commerce clause of the Constitution of the United States.

The Evidence.

Abstracts of the evidence are set forth in the transcript at pages 9 to 19 and 28 to 63. There was a total lack of testimony to sustain the allegations of the petition. For instance, there was no evidence that defendant used the streets of Leavenworth to sell liquors from his wagons as charged in paragraph 4 of the petition, nor that he received telephone orders for liquor at his residence in Leavenworth as charged in paragraph 7 of the petition, or that he directs or allows his employes to solicit or receive orders in the

city or county of Leavenworth or delivers liquors from his wagons on the streets as charged in paragraph 8 of the petition, or that he keeps his wagons loaded with liquor over night in Leavenworth and delivers them next morning as charged in paragraph 9 of the petition, or that any of the persons to whom defendant sells liquor are engaged in the liquor business in Leavenworth in violation of law as charged in paragraph 10 of the petition, or that defendant is using his warehouse in Missouri or his wagons, teams, drivers and telephones as shifts, or devices to evade the law as charged in paragraph 11 of the petition, or that the defendant only pretends to be engaged in interstate commerce and conducts his business wholly within the State of Kansas, as charged in paragraph 12 of the petition, or that defendant delivers liquor in other than original packages, as charged in paragraph 13 of the petition, or that defendant has a warehouse in the city and county of Leavenworth for the purpose of storing intoxicating liquor as charged in paragraph 15 of the petition. Not only is there a total absence of evidence to sustain these and other charges in the petition, but the positive and uncontradicted testimony shown in the record negatives every one of them.

Findings of Fact.

The trial court made findings of facts as shown on printed transcript of record, pages 20 to 23. In substance these findings are:

(1) That defendant (Kirmeyer) is and at all times hereinafter mentioned has been, a resident and citizen of the city of Leavenworth, Kansas.

(2) That about 1907 and prior to moving his office and place of business to Stillings, Missouri, the defendant had a place of business in Leavenworth, at which he kept telephones numbered 313.

(3) That about three years prior to the institution of this action the defendant moved his place of business from the city of Leavenworth, Kansas, to said town of Stillings, in Platte County, Missouri, where he has ever since kept and maintained an office and warehouse, at which point he receives beer in carload lots, and stores it in said warehouse in the town of Stillings, Missouri, for sale and delivery.

(4) The defendant pays the revenue tax required by the general government for those engaged in such business in Platte County, Missouri, and also pays a merchant's tax to Platte County in said state for the privilege of carrying on said business in Platte county, and also pays the general taxes on the value of his property, including beer in his warehouse located in Stillings, Missouri. The defendant has no malt or liquor dealer's license of any kind to sell liquor in the State of Kansas.

(5) The defendant has both telephones at his office in Stillings, Missouri, which are connected with both central telephone exchanges in Leavenworth City, Kansas, and he receives and accepts, at his place of business in Stillings, Missouri, orders by telephone and by mail from persons in Kansas, Oklahoma, Missouri and other states for beer.

(6) Any person desiring to purchase beer from the defendant transmits his order to the defendant at his place of business in Stillings, Missouri, by mail or telephone as aforesaid, which order, if accepted, is filled by selecting from his stock of beer in his warehouse, and setting aside the beer in kegs, cases, casks or barrels ordered, on which is placed a shipping tag or label, containing the name of the person to whom and the place where the same is to be delivered, and delivery is made to the person at the place named in said tag or label, in the original packages in which the orders are placed, either by deliverymen engaged in such business or by employes if the defendant with teams and conveyances owned or employed by the defendant for that purpose. No orders are received or accepted by the defendant within the State of Kansas.

(7) That collections are not made nor orders solicited or accepted at time of delivery of beer. Remittances sometimes are made by mail but defendant or an employe usually collects at certain periods. Defendant sells only to private families.

(8) That when defendant moved his office and place of business to Missouri, he moved his teams and wagons to No. 117 Delaware Street in Leavenworth where he had telephones installed, the number thereof being 313. If any person happens to call that number when defendant is there, he tells them to call up his place of business in Missouri.

(9) The Burlington, the Rock Island and the Chicago, Great Western, run through or near Stillings, Mo., and there is a freight depot but no station agent there. The Burlington sometimes ac-

cepts shipments from defendant at that point. Beer is purchased by defendant in carload lots and delivered to him in Missouri, except in a few instances he receives it over the Missouri Pacific Railroad at its Leavenworth freight depot, and hauls it by teams to his warehouse in Missouri.

(10) Sometimes when shipments cannot be made by common carrier from Stillings, Mo., to points in Kansas or elsewhere, the defendant attaches shipping tags with name and address of consignee on the beer cases or kegs at his place of business in Missouri and conveys them by wagon to a freight depot at Leavenworth for shipment to destination.

(11) Defendant has carried an advertisement in a weekly newspaper of limited circulation in Leavenworth, thus "Michael Kirmeyer, Stillings, Mo., Rochester Beer. Family trade especially. Phones 313." When defendant moved to Missouri, the telephone number, through oversight, was not changed in the advertisement. No orders are accepted over this telephone.

(12) Occasionally mail orders are addressed to defendant at Leavenworth, Kansas, instead of Stillings, Mo., but are sent over or mailed to the latter place before being opened or accepted.

(13) When beer is delivered in Leavenworth as aforesaid, the cases are charged to the consignee, and are afterward gathered up and loaded by defendant into a freight car in the railroad yards in that city and shipped out of the State. When so gathered, the customer is given credit therefor.

(14) No reason has been given in the evidence why defendant maintains a stable at Leavenworth and keep his teams and wagons there or continues to live in Leavenworth instead of Missouri, but from all the evidence it appears that such horses and vehicles are there kept because the defendant by preference lives there and it is more convenient to stable his teams and wagons on the Kansas side of the river.

(15) The defendant's residence in Leavenworth and the keeping of his teams and wagons there is not intended as a shift or device to evade or defeat the laws of Kansas; neither is the fact that mail is occasionally addressed to him at Leavenworth nor the fact that he maintains telephones at Leavenworth or advertises in the papers above mentioned, intended as shifts and do not in fact, circumvent or defeat the laws of Kansas.

(16) About 85 per cent of defendant's telephone orders are from persons living in Leavenworth.

(17) A railroad and wagon bridge spans the Missouri River at Leavenworth which is used in making deliveries, and tolls are paid for permission to cross.

(18) In making deliveries of beer as aforesaid, defendant uses the streets and alleys of Leavenworth, but no delivery is made on the public streets or alleys, but only on private premises of consignees.

Conclusions of Law.

On the findings of fact, the trial court made the following conclusions of law as shown in printed record, page 23:

"(1) That the sale and delivery of beer by the defendant to persons in the State of Kansas and other states in the manner stated in the findings of fact above, constitutes and is interstate commerce, and is within the scope and protection of Section 8 of Article 1 of the Constitution of the United States.

(2) Judgment should be entered for the defendant for his costs."

Judgment of Trial Court.

The state filed a motion to modify the findings of fact and a further motion for a new trial. The motion to modify was sustained in one or two minor particulars and the motion for a new trial was overruled and judgment entered for the defendant for costs (Trans. p. 25).

Judgment and Opinion of Supreme Court of Kansas.

On appeal by the State, the Supreme Court of Kansas reversed the judgment of the trial court and remanded the case "with instructions to enter judgment for the State as prayed for in the petition" (Trans p. 64). The prayer of the petition is as follows:

"That he be enjoined from conducting said unlawful business; that he be enjoined from maintaining, using and employing said wagons, vehicles, conveyances, horses, mules, telephones and any other property in the said unlawful manner herein alleged; that upon the final determination of this action said injunction be made permanent; that said wagons, vehicles, conveyances, horses, mules, telephones and other property used in said unlawful business be declared common nuisances and that the same be abated."

SPECIFICATIONS OF ERROR.

The plaintiff in error respectfully submits that the Supreme Court of Kansas erred in its opinion and judgment in the following particulars and each of them:

(1) That the court erred in holding that General Statutes of Kansas 1909, paragraphs 4362 and 4365 has any application to the facts of this case.

(2) The court erred in holding that General Statutes of Kansas 1909, paragraph 4372 has any application to the facts of this case.

(3) The court erred in holding that the General Statutes of Kansas 1909, paragraphs 4387 and 4388 have any application to the facts of this case.

(4) The court erred in holding that because the plaintiff had engaged in the liquor business in Kansas prior to his moving his place of business to Missouri, was evidence of his subsequent violation of the state law, and in basing its judgment in whole or in part upon that circumstance.

(5) The court erred in holding that because the petitioner moved his place of business to the State of Missouri about the time of the appointment of receivers in prosecutions against brewers, is evidence of violations of the state liquor law, and the court further erred in basing its judgment thereon, in whole or in part.

(6) The court erred in holding that because the petitioner's warehouse is located in Missouri, convenient to the Kansas line, is evidence of petitioner's violation of the liquor laws of the State of Kansas and the court further erred in basing its judgment thereon either in whole or in part.

(7) The court erred in holding that because there are eight or ten other liquor warehouses at Stillings, Missouri, convenient to the Kansas line, and no station agent or postoffice, is a circumstance tending to show petitioner's violation of the prohibitory laws of Kansas, and the court further erred in basing its judgment in whole or in part, upon that circumstance.

(8) The court erred in holding that because the petitioner moved his place of business across into Missouri, and leased a place in Leavenworth and equipped it with telephones, quartered his teams and wagons there, and continued to use his teams and conveyances in making deliveries of beer from his place of business in Missouri, is a violation or evasion of the prohibitory laws of the State of Kansas and the court further erred in basing its judgment, in whole or in part, upon that circumstance.

(9) The court erred in holding that occasional receipt of mail orders by the petitioner at Leavenworth, Kansas, and re-mailing or sending them into Missouri before opening them is a violation or evasion of the laws of the State of Kansas, or is a circumstance tending to show such evasion or violation and in basing its judgment in whole or in part thereon.

(10) The court erred in holding that because occasional applicants for beer called up telephones No. 313, being the number of this petitioner's stables in Leavenworth, Kansas, and were directed to call up across the river, is a violation or evasion of the laws of the State of Kansas, and the court further erred in basing its judgment, in whole or in part, upon that circumstance.

(11) The court erred in denying petitioner's right to gather up empty beer cases and bottles of shipments made from Missouri, and load them into a freight car in the freight yards or depots at Leavenworth, Kansas, and in holding that the same constitutes a violation or evasion of the laws of the State, authorizing injunction as prayed for by the State.

(12) The court erred in holding that orders received and accepted by the petitioner in the State of Missouri, for shipments of beer to points in Kansas, could not be sent or delivered by him in the State of Kansas, nor deliveries made to freight depots at Leavenworth, Kansas, for shipment to consignees in Kansas and that such acts were in violation or evasion of the State laws and should be enjoined.

(13) The court erred in holding in effect that the petitioner had no right to receive orders at his place of business in Missouri, and there label the kegs and receptacles and deliver the same by his own teams in Leavenworth, Kansas, and that such deliveries were an evasion of the State laws.

(14) The court erred in holding in effect that said acts, singly or collectively, were an evasion of the laws of the State of Kansas, and should be enjoined.

(15) The court erred in holding that said acts, were a shift or device to evade the prohibitory laws of the State of Kansas.

(16) The court erred in holding that said acts warranted injunction against petitioner carrying on his business in the State of Missouri, as shown by the findings of fact, and from and accepting orders there and delivering beer so ordered, to residents of the State of Kansas.

(17) The court erred in holding that the petitioner was not engaged in legitimate interstate commerce.

(18) The court erred in picking out isolated instances of suspicious or alleged unlawful acts, and making the same the basis for enjoining other and legal acts and prohibiting all of the petitioner's interstate business with persons in the State of Kansas.

(19) The court erred in holding that the petitioner had no right to store beer across the State line, to be afterwards delivered in Kansas, or to re-mail letters from the State of Kansas to himself in the State of Missouri, or to direct persons wishing beer to call up across the State line, and the court further erred in making these facts the basis for enjoining all of the business of the petitioner done with persons in Kansas.

(20) The court erred in denying the right of petitioner to enter into contracts in Missouri for the delivery of liquor in the State of Kansas, and in enjoining such delivery.

(21) The court erred in directing writ of injunction to prohibit shipments of beer from the State of Missouri, which shipments were and are made in pursuance of valid contracts entered into in the State of Missouri.

(22) The court erred in directing injunction against the use of your petitioner's teams, wagons, conveyances, telephones and other personal property in carrying on his business in and from the State of Missouri, and in declaring such articles of personal property to be common nuisances, and ordering their abatement.

(23) The court erred in holding that the injunction so directed does not deprive the petitioner of his rights under the Constitution of the United States to engage in or carry on interstate commerce.

(24) The court erred in holding that the injunction directed by it, does not interfere with petitioner's constitutional right to enter into contracts in the State of Missouri for the sale and delivery of beer in the State of Kansas.

(25) The court erred in holding that the writ of injunction and abatement directed by it is not in violation of Section 8 of Article 1 of the Constitution of the United States, which conferred on Congress the exclusive power to regulate commerce among the several states.

(26) The court erred in directing judgment to be entered in conformity with the prayer of the petition filed by the State.

(27) The court erred in denying petitioner's application for a rehearing.

ARGUMENT AND AUTHORITIES.

We will attempt to present separately the various assignments of error above specified, as they are necessarily all included under the general head of the right of plaintiff in error to carry on an interstate business free from the restraints and interference of the Kansas Court.

In its opinion the Supreme Court of Kansas, after reciting various prohibitory enactments and decisions of the state, says:

"The question to be determined here is whether the facts proven are sufficient to bring the case within these principles" (Rec. p. 71).

and further:

"The broad question here is whether the defendant was really engaged in commerce between the state of Missouri and Kansas, or was he only seeking by tricks and devices to evade the laws of his state—doing by indirection that which could not lawfully be done by ordinary and direct methods."

The basic findings of fact of the trial court are not challenged by the Supreme Court of Kansas, supported as they are by the only evidence in the case; but finding No. 15 which it characterizes as "a conclusion from the basic findings from which it is deduced," is alone disregarded. These basic findings of fact are shown beginning on page 20 of the printed record, and set forth in detail the manner in which defendant carried on his business.

These findings show that several years before the institution of this action defendant moved his business to Stillings, Missouri, which is about one and one-half miles east of the Missouri River opposite Leavenworth, where he has ever since kept his office and warehouse, and receives shipments of beer in carload lots and stores it in said warehouse for sale and delivery; that at his place of business in Missouri he pays the customary revenue tax to the general government, a merchants tax to Platte County, Missouri, and the general state and county taxes under the laws of that state, and that he had no license of any kind to do business in Kansas; that he has telephones at his office in Stillings, Missouri, connected with the general telephone exchange at Leavenworth, Kansas, over which telephones he receives and accepts or-

ders for beer from points in Kansas, Missouri and other states; that these orders when accepted are filled by selecting from his stock in said warehouse at Stillings, Missouri, cases, kegs and barrels of beer, setting them aside, placing shipping tags thereon containing the name and address of the consignees and delivering them in the original packages by wagon or otherwise, to the respective purchasers, and that no orders are received or accepted in the State of Kansas; that collections are not made at the time of delivering said original packages and that sales are not made or orders solicited by defendant's employees. The Supreme Court of Kansas holds that all of these things were tricks and devices to evade the laws of Kansas and may be enjoined and abated, and as evidence of defendant's bad faith quotes detached portions of the evidence as to his use of the United States mail, the telephone between the two states, the advertisement in a small newspaper, the number of houses and beer warehouses in Stillings, Missouri, and the absence of a station agent there and concludes that defendant's business does not bear the badge of "real interstate commerce." How far away from the Kansas border defendant should move and how many or how few residences or beer warehouses there should be in the town of a foreign state to give his business the badge of interstate commerce, is not stated by the court, and many other things are left to conjecture. However, the basic findings of fact of the trial court are not disputed and all the questions here have arisen prior to the recent acts of Congress delegating to states limited supervision over interstate shipments of intoxicants. The question here presented is whether the business of defendant can be enjoined and abated under the state law. In this connection the further question arises, to-wit: If the business of plaintiff in error, or any part thereof is interstate and any part thereof intrastate or local, did the Supreme Court of Kansas transcend its authority in declaring *all of his business* to be a common nuisance and ordering it enjoined and abated?

As to the method of abatement the Kansas statutes provide:

"If the court shall find that said intoxicating liquors or other property or any part thereof, were at the time of complaint or information was filed, being used in maintaining a common nuisance, he shall adjudge forfeited so much thereof as he shall find was being so used, and shall order the officer in whose custody it is to publicly destroy the same," etc. (Sect. 4392, Stat. 1909).

Interstate Commerce and Necessary Incidents Thereof.

In *Covington etc., Bridge Co. v. Kentucky*, 154 U. S. 209, it is said:

"The adjudications of this court with respect to the power of the states over the general subject of commerce are divisible into three classes. First, those in which the power of the state is exclusive; second, those in which the states may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive, and the states can not interfere at all."

It is pointed out that under the first class are grouped the exclusive powers of the states pertaining to commerce carried on within the limits of their borders; under the second class are those cases of what may be called concurrent jurisdiction, embracing among other things, quarantine and inspection laws and the policing of harbors; the third class embraces those cases where whenever the laws "instead of being of a local nature and not affecting interstate commerce but incidentally, are national in their character, the non-action of Congress indicates its will that such commerce shall be free and untrammelled," and it is said: "Subject to the exceptions above specified as belonging to the first and second classes, the states have no right to impose restrictions, either by way of taxation, discrimination, or regulation upon commerce between the states."

If the present case falls under the first head, to-wit, business carried on within the limits of the state over which the power of the State of Kansas is exclusive, the case has no business in this court. But if the facts show, as they undoubtedly do, that the business of plaintiff in error is established and licensed in another state where his business is recognized as legal, then this case must fall under one of the other two heads. Numerous cases in this court have held that state laws dealing with the importation and sale of intoxicating liquors are not classed with quarantine and inspection laws, but deal with a recognized article of interstate commerce, which is not subject to the concurrent jurisdiction of the states. Thus in *Vance v. Vandercook*, 170 U. S. 438, it was said that:

"The right to send liquors from one state into another, and the act of sending the same is interstate commerce, the regulation whereof has been committed by the Constitution

of the United States to Congress, and hence that a state law which denies such a right, or substantially interferes with or hampers the same, is in conflict with the Constitution of the United States."

It would seem, therefore, that this case necessarily comes under the third class, to-wit, those cases wherein the power of Congress is exclusive and the states have no right to interfere. And such we understand to be the consistent and uniform ruling of this court. (*Bowman v. Railway*, 125 U. S. 465; *Leisy v. Hardin*, 135 U. S. 100; *Vance v. Vandercook*, 170 U. S. 438; *Scott v. Donald*, 165 U. S. 58; *Norfolk & West. Ry. v. Sims*, 191 U. S. 441; *Heyman v. South. Ry.*, 203 U. S. 270; *Adams Express Co. v. Kentucky*, 206 U. S. 138; *Adams Express Co. v. Kentucky*, 214 U. S. 218.)

In this case plaintiff in error at his place of business in Stillings, Missouri, receives and accepts orders from customers in Missouri, Kansas and Oklahoma. Under the law of Missouri he has an undoubted right to do this and the contracts are valid in that state. These customers have an undoubted right to order and receive beer for their own use and a state law which would deny this right is void. (*Scott v. Donald*, 165 U. S. 58; *Vance v. Vandercook*, 170 U. S. 452.) The defendant ships his orders to Kansas in fulfillment of his contracts made in Missouri, and is met with an injunction directed by the Supreme Court of Kansas and an order to seize and destroy *all of his property* used in his business, because that court says, he is evading the state law. Is not this exercising extra-territorial jurisdiction? Is it not also impairing the obligation of contracts? Is it an answer for the state to say that the defendant intends to evade its laws? Has not this court repeatedly held that a state law which interferes with or forbids interstate traffic is void? If this be so, how can the *motive* of the defendant to evade such a law, infuse life and validity into it? For instance, a statute of Iowa enacted that no person should manufacture, sell, keep for sale or give away any intoxicating liquor without obtaining a permit. Gus Leisy & Company of Illinois shipped intoxicating liquor into that state to sell it in the original package without obtaining a permit. The liquor was seized by the state officers and in an action brought to recover the goods, the trial court made findings of fact. Finding No. 6 reads:

"And the court finds that said intoxicating liquors thus seized by the defendant in his official capacity as constable

were kept for sale in the premises described in the search warrant in Keokuk, Lee County, Iowa, and occupied by Gus Leisy & Co. *for the purpose of being sold in violation of the provisions of the laws of Iowa,*" etc.

Here was a direct finding that the importer was trying "by tricks and devices" as the Kansas Court would say, to evade and violate the law of Iowa. Was it therefore held that the state court had a right to inquire into the *bona fides* of the transaction and because of these tricks and devices of the defendant, hold him amenable to the state law? Not at all. On the contrary this court reversing the Supreme Court of Iowa, held that:

"A statute of a state, prohibiting the sale of any intoxicating liquors, except for pharmaceutical, medicinal, chemical or sacramental purposes, and under a license from a county court of the state, is, as applied to a sale by the importer, and in the original packages or kegs, unbroken and unopened, of such liquors manufactured in and brought from another State, unconstitutional and void, as repugnant to the clause of the Constitution granting to Congress the power to regulate commerce with foreign nations and among the several states." (*Leisy v. Hardin*, 135 U. S. 100.)

The plaintiff in error here was either engaged or was not engaged in interstate commerce. If he was so engaged, he had a right to be, or he had not. If he had a right to be so engaged, his *motives* in the premises are immaterial, and can not vitiate an otherwise valid business or transaction. In touching upon this phase of interstate commerce in *O'Neil v. Vermont*, 144 U. S. 347, Justice Field said:

"Nor can it make any difference what motives may be imputed to the parties on the one side in selling and on the other in purchasing the goods; the only inquiry which can be considered, is, were the goods bought and sold, subject of lawful commerce, for if so, they were in their transportation between the parties—citizens of different states until their delivery to the purchaser or consignee in the completion of the contracts of sale, under the protection of the commercial power of Congress."

No Divided Jurisdiction.

If plaintiff in error was engaged in interstate traffic in a recognized article of commerce as the evidence and findings clear-

ly show he was, there can be no "twilight zone" of jurisdiction between the state and nation. As said in the Minnesota Rate Cases recently decided:

"The power of Congress extends to every part of interstate commerce and to every instrumentality or agency by which it is carried on, and the full control of Congress over the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations." (*Simpson v. Shepherd*, 230 U. S. 352.)

As to Citizenship.

The Supreme Court of Kansas while admitting the right of plaintiff in error to engage in interstate commerce although a citizen of that state, attaches to his citizenship a certain obligation to observe its laws, not attaching to non-residents. However, we do not understand that one's right to carry on interstate commerce is either enlarged or abridged by reason of his citizenship. It is not the circumstances of citizenship but that of contract and traffic between states that controls. As said by the Court of Appeals of New York:

"The fact that both actors in the transaction were non-residents has no bearing on the question, for commerce among the states does not depend on the residence of the parties, but on the interchange of property between different states." (*People v. Reardon*, 184 N. Y. 452.)

Keeping Stable in Kansas.

Nor do we understand that because of defendant keeping his horses and wagons in Leavenworth, Kansas, abridged his rights under the commerce clause. If one could not engage in interstate commerce with the state in which he may keep a part of the instrumentalities of his business, the proposition has not yet been so adjudicated by this court. Why the defendant should not keep his teams and wagons in Kansas in preference to Missouri and still be engaged in interstate commerce, is not apparent.

Mail and Telephones.

The Kansas Supreme Court enjoins among other things, the use of telephone communication with his place of business in Missouri and his receipt of mail orders in Kansas. One of these is a Federal service and both of them are interstate agencies. (*In re Penn. Telephone Co.*, 48 N. J. E. 91.)

Cases Relied on by Kansas Court.

To support its view that defendant is not engaged in "legitimate interstate commerce" the Supreme Court of Kansas cites *Austin v. Tennessee*, 179 U. S. 343. It is said in that case:

"The Supreme Court of Tennessee placed its decision of this case upon two grounds: First, that cigarettes were not legitimate articles of commerce; second, that the sale shown to have been made was not the sale of an original package in the true commercial sense."

There was a difference of opinion among the members of this court as to the second proposition laid down by the Supreme Court of Tennessee, but the first proposition was unanimously denied, upon which point in his dissenting opinion, Justice Brewer said:

"It would seem from this concurrence of rulings that the decision in *Leisy v. Hardin*, *supra*, had now become the settled law, and that henceforth, it is not to be questioned; that no state can, under the guise of a police regulation, directly restrain the importation and sale of articles brought in from other countries and other states, which are recognized articles of commerce, no matter what may be the local opinion as to the injurious effects of the use of such articles. The opinion of the Supreme Court of Tennessee on the first proposition suggested must, therefore, be considered as definitely overruled" (p. 379).

Continuing, Justice Brewer said:

"I pass now to the second proposition, which is that the packages in which these cigarettes were imported are so small, or the manner of their importation so peculiar, that the power of Congress over interstate commerce is as to them lost and the power of the state has become controlling. That this is the question upon which alone the reversal is ordered is evident, for it is said by Mr. Justice Brown, in his opinion, after referring to the matter of the police power:

'We are remitted to the inquiry whether a paper package of three inches in length and one and a half inches in width, containing ten cigarettes, is an original package protected by the Constitution of the United States against any interference by the State while in the hands of the importer.' This we regard as the vital question in the case."

And by Mr. Justice White, in his concurring opinion:

"Indeed, as I understand the case as now decided, all the questions adverted to are merged in the solution of the one

decisive issue, which is: 'Was each particular parcel of cigarettes an original package within the constitutional import of those words as defined by the previous adjudications of the court.' "

Therefore the sole and only question decided in the Austin case was whether the bunches of cigarettes were original packages. To emphasize this fact, Justice White, in his concurring opinion, after referring to the Leisy case and others, said:

"If I thought either the opinion of the court just announced or the conclusion which it reaches had the effect of weakening the doctrine upheld by the authorities to which I have just referred, I should be unable to concur. Indeed, as I understand the case as now decided, all the questions adverted to are merged in the solution of the one decisive issue, which is, was each particular parcel of cigarettes an original package within the constitutional import of those words as defined by the previous adjudications of the court? I am constrained to conclude that this question is correctly answered in the negative, not only from the size of each particular parcel, but from all the other surrounding facts and circumstances, among which may be mentioned the trifling value of each parcel, the absence of an address on each, and the fact that many parcels, for the purpose of commercial shipment, were aggregated, thrown into and carried in an open basket. Thus associated in their shipment, they could not, under all the facts and circumstances of the case, after arrival be segregated so as to cause each to become an original package."

In the case now before this court there is no question whatever as to the size of the original packages imported by the defendant into Kansas, but it is sought by the Supreme Court of that state to extend and enlarge the doctrine of the Austin case to every manner and form of interstate business and to every agency employed therein, including the use of interstate telephones, the Government mail service, the keeping of horses, wagons and stables in Kansas, etc., and to abate each and all as a common nuisance, because, in the opinion of that court the defendant is "seeking to evade the prohibitory laws of Kansas." This is an assumption of state authority never contemplated in the Austin case in which no intention directly or indirectly to overrule *Leisy v. Hardin* or similar decisions was disclosed. Numerous cases of this court might be cited which deny the power claimed by the Supreme Court of

Kansas, some of which have already been cited in this brief and many of which are referred to approvingly in the several opinions written in the Austin case.

In view of the undoubted constitutional right of plaintiff in error to engage in the wholesale liquor business in Missouri as he has done, and to enter into contracts there for shipments of beer into Kansas, the language of this court in the case of *Rhodes v. Iowa*, 140 U. S., seems to be particularly pertinent. On page 424 it is said :

"Whilst it is true that the right to sell free from state interference interstate commerce merchandise was held in *Leisy v. Hardin* to be an essential incident to interstate commerce, it was yet but an incident, as the contract of sale within a state in its nature was usually subject to the control of the legislative authority of the state. On the other hand, the right to contract for the transportation of merchandise from one state into or across another involved interstate commerce in its fundamental aspect, and imported in its very essence a relation which necessarily must be governed by laws apart from the laws of the several States, since it embraced a contract which must come under the laws of more than one State. The purpose of Congress to submit the incidental power to sell to the dominion of state authority should not without the clearest implication be held to imply the purpose of subjecting to State laws a contract which in its very object and nature was not susceptible of such regulation even if the constitutional right to do so existed, as to which no opinion is expressed. And this view is cogently illustrated by the opinion in the Bowman case, where it was said (pp. 486-487) :

'Has the law of Iowa any extra-territorial force which does not belong to the law of the State of Illinois? If the law of Iowa forbids the delivery, and the law of Illinois requires the transportation, which of the two shall prevail? How can the former make void the latter? In view of this necessary operation of the law of Iowa, if it be valid, the language of this court in the case of *Hall v. De Cuir*, 95 U. S. 485, 488, is exactly in point.'

If the alleged motive of the importer suspends the federal constitution and permits state police power over interstate commerce to attach, then no article of interstate commerce, whether intoxicating liquor or potatoes, is exempt from state interference and control. Under the rule contended for by the Supreme Court of Kansas "the police power would not only be a formidable rival,

but, in a struggle, must necessarily triumph over the commercial power, as the power to regulate is dependent upon the power to fix and determine upon the subjects to be regulated." (License cases; *Pierce v. New Hampshire*, 5 How. 597.) In that situation the freedom of commerce between the states and the obligation of contracts protected by the federal constitution and the many adjudications of this court thereon at once become mere "scraps of paper" without force or effect.

In conclusion it is submitted that the Constitution of the United States, the laws of Congress passed in pursuance thereof and the decisions of this court are the supreme law of the land, and that, as stated in *American Express Co. v. Iowa*, 196 U. S. 133:

"The right of the parties thereto to make a contract, valid in the state where made, for the sale and purchase of merchandise, and in so doing, to fix the time when, and the conditions on which complete title shall pass, is beyond question."

If any part of the business of plaintiff in error was of an intrastate or local character, that part, and that alone, could properly be enjoined and abated, but as no part of such business was shown to be of a local character, we respectfully submit that the order and judgment of the Supreme Court of Kansas is erroneous in every particular and should be reversed.

A. E. DEMPSEY,
Attorney for Plaintiff in Error.

FRANK DOSTER,
Of Counsel.



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In the Supreme Court of the United States.

October Term, 1914.

M. KIRMEYER, *Plaintiff in Error*,
vs.

No. 145.

THE STATE OF KANSAS, *Defendant in Error*.

IN ERROR TO THE SUPREME COURT OF THE
STATE OF KANSAS.

STATEMENT OF CASE.

This action was originally commenced in the district court of Leavenworth county, Kansas, to enjoin the plaintiff in error from maintaining an alleged liquor nuisance. From the judgment of the district court, in favor of the defendant in that court, the defendant in error appealed to the supreme court of the state of Kansas, where the judgment of the district court was reversed and the case was remanded and the district court was directed to enter judgment in favor of the plaintiff, as prayed for in the petition filed in said cause.

Briefly summarized, the evidence in the case showed that the plaintiff in error, M. Kirmeyer, was a resident of Leavenworth county, Kansas, and had been such resident for about thirty years; that he had been en-

gaged in the sale of intoxicating liquors in Leavenworth county in violation of the laws of the state of Kansas for many years; that his place of business prior to this time, had been at 117 and 117½ Delaware street, Leavenworth, Kan.; that about four or five years before the commencement of this suit, actions were brought against various wholesalers doing business in Leavenworth county, Kansas, to oust such wholesalers from carrying on their business, and that Mr. Kirmeyer, upon the appointment of receivers by the supreme court, went across the river and established a warehouse at Stillings, Mo.; that there is a freight depot at Stillings, Mo., but no agent; that the beer handled by Mr. Kirmeyer came from Kansas City, Mo., just a few miles away; that some of the beer was shipped from Kansas City, Mo., to Leavenworth, and Mr. Kirmeyer hauled it from Leavenworth just across the river to Stillings. The evidence also showed that 25 per cent of the business transacted by Mr. Kirmeyer was transacted with the citizens of the city of Leavenworth, in Leavenworth county, Kansas, and that practically all his business was confined to the state of Kansas; that in carrying on his business he employed his own teams and drivers in delivering beer to customers in Leavenworth; that he maintained telephones at his warehouses, 117 and 117½ Delaware street, Leavenworth, Kan.; that he carried an advertisement in the Leavenworth papers as follows:

Michael Kirmeyer,
Stillings, Mo.
Rochester Beer.
Family Trade Especially.
Phones 313.

This phone number, 313, was the number of the phones in his warehouses and stables in Leavenworth, Kan. He testified that he forgot to change the number of the phone in this advertisement.

The evidence also showed that when he received orders for beer from Oskaloosa, Topeka and other points in Kansas, he would haul the beer across the river to

Leavenworth, Kan., and it would be billed out from Leavenworth, Kan., to the points in Kansas. The evidence also showed that Mr. Kirmeyer received orders for beer at Stillings—some by letter and some by phone. It also showed that there was no postoffice at Stillings; that he got his mail in Leavenworth, but he claimed that he was careful not to open any of the beer order mail until he in person had carried the mail across to Stillings, Mo., where he opened the mail and filled the orders. The testimony showed that sometimes he remailed these letters to Stillings; that the orders received from Leavenworth were filled by him loading up beer in the wagons and delivering the beer ordered to the persons in Leavenworth who had ordered it, and that he would send his wagons around again and pick up the empties and return the empties to Kansas City, Mo., shipping the same from Leavenworth to Kansas City, Mo. There is no evidence that the empties were ever taken back to Stillings and from there sent to Kansas City, Mo. The plaintiff in error himself testified that before he established a warehouse over at Stillings, Mo., he carried on a family trade in beer with various citizens of Leavenworth and that since he had established this warehouse there had been practically no change in the way of his doing business from the way he carried on the business when he was making no pretense of being engaged in interstate commerce.

A statement of the facts in the case and the evidence, so far as the same seems to be pertinent to the case, is set out fully in the decision of the supreme court of Kansas in this case, found in vol. 88, Kansas Reports, page 589, the testimony commencing at page 593 and continuing to page 597 of the opinion.

ARGUMENT AND AUTHORITIES.

The plaintiff in error in this case has set out twenty-seven specifications of error but does not, in his argument, attempt to argue these specifications separately, for the reason that the only question involved in this case is whether or not the plaintiff in error was, in good faith, engaged in the business of interstate commerce, and whether his business was under the protection of the interstate commerce clause of the constitution.

The supreme court of this state held that the plaintiff in error was not engaged, in good faith, in interstate commerce. (*State v. Kirmeyer*, 88 Kan. 589.)

The trial court, after making certain findings of fact, found as a conclusion of law, that the sale and delivery of beer by the plaintiff in error to persons in the state of Kansas and other states in the manner stated in the findings of fact above constitutes and is interstate commerce and is within the scope and protection of section 8, article 1, of the constitution of the United States; while the supreme court of the state of Kansas found, as a conclusion of law, that the sale and delivery of beer by the plaintiff in error, as stated in the findings of the trial court, did not constitute interstate commerce in good faith and was not within the scope and protection of section 8, article 1, of the constitution of the United States. The whole controversy hinges about these propositions.

The court will notice that the plaintiff in error, in his testimony, stated in substance that about the year 1907 certain receivers were appointed by the supreme court of the state of Kansas to take charge of the properties of brewing companies in Kansas; that when these receivers appeared in Leavenworth he, along with other beer agents and dealers with warehouses in Leavenworth, moved across the Missouri river to Stillings, Mo., in order to get his property away from the receivers. He admitted that he received his beer from

the Rochester Brewing Company of Kansas City, Mo., in car-load lots at Stillings, Mo., and that some was received at Leavenworth, Kan., and all came in cases, casks and barrels; that he stored this liquor at Stillings, Mo., for future delivery in Leavenworth. He also admitted that practically all of his orders for beer were received over the two telephones directly connected with the Leavenworth exchange. He admitted that he carried business advertisements in the two Leavenworth papers. In these advertisements it is shown that he solicited orders over two telephones maintained by him at his stables and warehouses located at 117 and 117½ Delaware street, Leavenworth, Kan. He also claimed that most of his orders were received over his two telephones at Stillings. He admitted that when orders for beer were received he filled them by taking the cases, casks and barrels out of his warehouse at Stillings; that he tagged them to the customers in Leavenworth, or gave the tags to his drivers, loaded them on his own wagon or on wagons employed by him and then delivered them, free of transportation charges, to his customers within the city and county of Leavenworth. His testimony shows that there was no intervention of a common carrier in making these deliveries. He admitted that after the beer was delivered in Kansas he collected his bills for it in Kansas, and that most of this was done by him personally. He also admitted that he never delivered his beer in his own wagons or conveyances employed by him at any other point save and except Leavenworth. He further admitted that in making his deliveries he used the streets and alleys of the city of Leavenworth. He also admitted that he received some orders for beer to be delivered at points in Kansas outside of Leavenworth, and that in filling these orders he hauled the beer, in his own wagons, from Stillings to the freight depot at Leavenworth, Kan., and took way-bills for the shipments, dated at Leavenworth, and shipped it from there.

All of these admissions having been made and this testimony having been given by the plaintiff in error, neither an extensive brief nor an elaborate argument should be necessary to convince this court that no federal question is involved in this case; that the method of conducting his business, as detailed by the plaintiff in error, is but a shift, device and subterfuge to evade the prohibitory laws of Kansas, which the plaintiff in error admitted he had been constantly violating up to the appointment of receivers by the supreme court of this state. We think that the supreme court of this state was right in directing the lower court to grant to the state a permanent injunction as prayed for in the amended petition. We think it is beyond argument that where the seller undertakes the delivery of the commodity sold by him, the place of delivery is the place of sale, the contract of sale being executory until the sale is made. This is especially true where there is no intervention of a common carrier.

"If the seller of intoxicating liquors, in person or by his agent, delivers the goods to the purchaser and receives the price therefor at the latter's place of business, without the intervention of a common carrier, the place of delivery is the place of sale, and it is of no importance where the order for the liquor was given or the agreement to sell was made. While the goods are in the hands of the seller or his agent the contract is executory and either may impose conditions or recede from it. The rule stated has been applied in prosecutions for the violation of local option laws in prosecutions for sales in territory not covered by the seller's license, and in prosecutions of a foreign dealer for sales in a prohibition state."

Am. & Eng. Ency. of Law, second ed., vol. 17, pages 301, 302.

This question is so well settled that the defendant in error does not deem it necessary to discuss it fur-

ther, but submits the following authorities on the subject:

- State v. Kind, (N. Y. Sup.) 75 Atl. 438.
- Anglin v. State (Miss.) 50 So. 728.
- Cook Brewing Co. v. Commonwealth (Ky.) 99 S. W. 354.
- Bagby v. State (Ga.) 9 S. E. 721.
- City v. Henning (Ill.) 42 Ill. App. 159.
- Commonwealth v. Greenfield, 121 Mass. 40.
- Commonwealth v. Burgett, 136 Mass. 450.
- Commonwealth v. Hugo, 164 Mass. 157.
- State v. Houts, 36 Mo. App. 265.
- People v. Capen, 26 Hun. (N. Y.) 377.
- Commonwealth v. Holstine, 132 Pa. 357.
- Northcutt v. State, 35 Tex. Cr. Rep. 584.
- State v. O'Neil, 58 Ver. 140, s. c., 144 U. S. 323.
- State v. Shuster (N. J.) 63 N. J. Law 355.
- Swift v. State (Tenn.) 108 Tenn. 610.

The testimony of the plaintiff in error is that he is a dealer in beer, not an agent of the Rochester Brewing Company, of Kansas City, Mo. Therefore, he can not claim that his deliveries were made for the brewing company. The shipments of beer from the brewing company to him are entirely intrastate, except those made from Kansas City, Mo., to Leavenworth, Kan. It matters not that after receiving his orders for beer at Stillings, he fills the orders by delivering it in the same cases, casks and barrels he receives it in from the brewing company. Even if he were making deliveries for the brewing company, the sales would still be made in Kansas, the place of delivery, there being no intervention of a common carrier.

It is evident that the Wilson act contemplates a *bona fide* interstate transaction, through the intervention of a common carrier. This act reads as follows:

"That all fermented, distilled, or other intoxicating liquors or liquids transported into any state or territory or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the

laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

26 Stat. at L. 313, ch. 728.

In discussing the Wilson act this court, in the case of *Delamater v. South Dakota*, 51 L. Ed. 724, on page 728, U. S. Supreme Court Reports, says as follows:

"It is settled by a line of decisions of this court, noted in the margin, that the purpose of the Wilson act, as a regulation by congress of interstate commerce, was to allow the states, as to intoxicating liquors, when the subject of such commerce, to exert ampler power than could have been exercised before the enactment of the statute. In other words, that congress, sedulous to prevent its exclusive right to regulate commerce from interfering with the power of the states over intoxicating liquor, by the Wilson act adopted a special rule enabling the states to extend their authority as to such liquor shipped from other states before it became commingled with the mass of other property in the state by a sale in the original package."

This decision was rendered in a case involving the constitutionality of an act of South Dakota imposing a license charge upon the business of selling or offering for sale intoxicating liquors within the state by any traveling salesman who solicited orders in quantities of less than five gallons, and the court held in that decision that such a law, when applied to interstate transactions, could not be regarded as repugnant to the commerce clause of the federal constitution, in view of the provisions of the Wilson act that intoxicating liquors coming into the state shall be as completely under its control as if manufactured therein.

The state of Kansas has a law prohibiting the taking of orders for intoxicating liquors within the state, which is as follows:

"Any person who shall take or receive any order for intoxicating liquor from any person in this state, or any person who shall, directly or indirectly, contract

for the sale of intoxicating liquor with any person in this state, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished therefor as provided in this act for selling intoxicating liquor."

Section 4365, Gen. Stat., Kansas, 1909.

Mr. Kirmeyer's testimony shows beyond question that he, by advertisement in the papers of Leavenworth and otherwise, was soliciting orders for the sale and delivery of intoxicating liquors in the city of Leavenworth, Kan.

The question as to whether or not the remedy sought by the state is within the scope of the statutes of Kansas, or was such a remedy as could be granted the state under the laws of the state, is not a question before this tribunal for decision. The only question that this court can examine into is the question of whether or not the plaintiff in error, in the business which it is shown he transacted, is protected by the commerce clause of the constitution from any effort made by the state to prohibit the carrying on of such business. Were it not true that the Wilson act contemplates *bona fide* interstate commerce, through the intervention of a common carrier, futile indeed would be the effort of any state to prohibit the sale and delivery of any objectionable commodity within its confines. By simply establishing a source of supply just beyond the state line, the dealer in the prohibited commodities, under the guise of being engaged in commerce between the states, could trample the police regulations of the state under foot and deliver contraband goods all over it. The admissions of the plaintiff in error show that he held the title to his beer until he delivered it to his customers in Kansas, reserving to himself the right to part with that title if he so desired, or to retain the title and return the beer to Stillings, Mo.

Under Mr. Kirmeyer's testimony, when he received an order for a case of beer from a citizen of Leavenworth he did not put such beer into the custody of a common carrier, nor did he deliver it to such common

carrier for his customer, but he retained control of the beer himself, hauled it in person across the river, and could have at any time after he reached Kansas and before he turned it over to his customer returned the beer to the warehouse in Stillings, Mo., and the customer would have had no claim upon the same, no right of ownership, no special title or interest in the beer.

Is the plaintiff in error under the protection of the interstate commerce clause of the constitution and is he entitled to carry on his business unmolested by the state officers, and can he not be prosecuted or enjoined from doing business in the way that he admits he has been doing it?

On the question of where the sales were made, we desire, in order to save the court some labor, to quote from some of the cases heretofore cited.

"Where a person in the business of selling intoxicating liquors had a license to sell in a certain county where his place of business was located, and customers in another county ordered liquors by mail, making payment in advance, the sale was consummated upon delivery of the goods ordered in the other county where the seller had no license."

State v. Kind, (N. J. Sup.) 75 Atl. 438.

"The purchaser of liquor sought the seller for the purpose of buying whiskey, met him out of the state, there contracted with him for the purchase, not of any particular whiskey, but of nine bottles, to be afterward set apart for and delivered to the purchaser, which delivery was made by the seller within the state, the price being paid at the time of the contract out of the state. Held, that the sale was not completed until delivery, and so was made in the state and was subject to its laws."

Anglin v. State, (Miss.) 50 So. 728.

"Where one made an agreement for the purchase of a case of beer at a warehouse where many cases were stored, but no particular case was designated, the place of delivery was the place of sale."

Cook Brewing Co. v. Commonwealth, (Ky.) 99 S. W. 354.

"Where a dealer, whose place of business is beyond the limits of a prohibition county, delivers liquor in

such county in compliance with an order, whether by himself or agent, and receives pay for it, the sale is consummated in that county, there being no intermediate delivery to or through a common carrier."

Bagby v. State, (Ga.) 9 S. E. 721.

"Beer stored in a town and delivered by agents must be deemed sold in the town, within the meaning of the license laws, although the principal lives and his office is in an adjoining town, and people wanting beer communicate with the office."

City of Spring Valley v. Henning, 42 Ill. App. 159.

"The fact that a person licensed to sell liquors in the town of 'P' received by letter an order from a purchaser in the town of 'L,' sets apart the liquor into his own wagon in 'P' and carries it to 'L' to the purchaser, and was afterwards paid by him therefor, warrants an inference that the seller did not intend to part with the title until delivery at 'L,' and consequently the sale was at 'L' and not at 'P.'"

Commonwealth v. Greenfield, 121 Mass. 40.

"'A,' who had a place of business in 'B,' where he sold liquors, advertised that he would sell to persons in 'H' and 'B' prices, free of expressage, and that application might be left in a post office box in 'H,' which was hired by an employee of 'A.' Upon an application being left in the box, it was taken by the employee of 'A,' who delivered a bottle of whiskey to an expressman in 'B,' who carried it to the person ordering it in 'H.' Held, that 'A' might be convicted of a sale in 'H.'"

Commonwealth v. Burgett, 136 Mass. 450.

"Defendant was a licensed dealer in liquors in Boston and was proprietor of parcel express wagons. Persons living in a district wherein the sale of liquors was prohibited sent written orders to the defendant, through his employees, or by depositing the orders at one of the express offices, instructing him, as their agent, to purchase and accept the delivery of liquors from himself, at Boston, and ship them by express. The orders were accompanied by money for the purchase of the liquors and upon receipt thereof the liquors were set apart and shipped to the respective customers by the express wagons. Held, that there was evidence from which the jury might infer that the delivery of the liquors was made by the defendant in the prohibited district."

Commonwealth v. Hugo, 164 Mass. 157, s. c., 41 N. E. 123.

"Defendant, employed by a brewing company to sell and deliver beer, delivered to a purchaser and received payment for beer in a county in which 'local option' was in force. Held, that he was indictable, though the beer was sold and delivered on orders taken by him outside the county."

State v. Houts, 36 Mo. App. 265.

"'A' as servant of 'B' took from 'C' an order for a case of lager in Corinth, where no licenses for sales thereof were granted, carried it to 'B' at Glens Falls, where 'B' delivered to 'A' the quantity ordered, which 'A' thereupon took to Corinth, delivered to 'C,' and received the pay. Held, that the sale was made at Corinth, and 'A' was liable for violation of the excise law."

People v. Capen, 26 Hun (N. Y.) 377.

"Where a liquor dealer procures orders and delivers liquor in another county from that in which he has his place of business, it constitutes a sale and delivery in the former county."

Commonwealth v. Holstine, 132 Pa. 357, s. c., 19 Atl. 273.

"A liquor dealer whose saloon is outside a county in which prohibition under local option is in force, makes a sale within the county when he complies with a written order for liquor, from a person having a place of business within the county, to be delivered at such place of business."

Northcutt v. State, 35 Tex. Cr. Rep. 524, s. c., 34 S. W. 946.

"Where there is a condition precedent attached to the contract, the title in the property does not pass to the vendee until there has been a performance or a waiver of the condition; and where goods are sent C. O. D., the title does not pass until they are accepted and paid for."

State v. O'Neil, (Ver.) 58 Ver. 140, s. c., 2 Atl. 586.

(Note.—The above case was appealed to the supreme court of the United States. It involved the conviction of a resident of the state of New York for shipping liquors to Rutland, Ver., by express, the express company collecting the price of the liquors and express

charges upon conditions made by the seller. He was convicted of making the sales in the state of Vermont. The judgment of the state court was affirmed by the supreme court of the United States, and the opinion discusses the proposition of the place of sale quite fully.) (See 144 U. S. 323.)

"A wholesale liquor dealer, licensed to sell liquors at a designated place in 'C' county, was accustomed to fill orders from 'C' county, where he had no license, sending the goods by his own delivery wagon. The driver of this wagon would furnish customers, under general orders, with bottled beer from a common stock carried in the wagon, collecting the price on delivery. Held, under indictment of the driver for unlicensed sale of liquors, that the transaction last stated constituted sales in 'C' county and was indictable."

State v. Shuster, (N. J.) 63 N. J. Law 355, s. c., 41 Atl. 701.

"Defendant, being in the employ of parties licensed to sell intoxicating liquors in one county, visited another county, where neither he nor his employers were licensed, as collectors, and while there telephoned them to send liquor to a former customer, as requested by him, and the liquor was sent by a hackman, who made daily trips for the carrying of express, passengers, etc., and was received by the customer on credit. Held, to sustain a conviction for retailing liquor without a license."

Swift v. State (Tenn.), 108 Tenn. 610, s. c., 69 S. W. 326.

The plaintiff in error, being a citizen of Kansas, was engaged in transacting business with other citizens of Kansas, and we do not think that the fact that he had removed his warehouses from Leavenworth to Stillings, to escape the activity of the Kansas officers, changed his business from intrastate to interstate. It is hard to define just what is meant by "interstate commerce." This court has intimated at least in many cases that it must involve commerce between the citizens of different states.

In the case of *Hopkins v. United States*, 43 L. Ed. 222, 171 U. S. 578, it is said:

"Definitions as to what constitutes interstate commerce are not readily given.—It comprehends, as it is said, intercourse for the purpose of trade in any and all of its forms, including transportation, purchase, sale and exchange of commodities between *citizens of different states*."

In the Trade-Mark cases, 100 U. S. Reports, 82, the court, on page 96, says:

"Governed by this view of our duty, we proceed to remark that a glance at the commerce clause of the constitution discloses at once what has been often the subject of comment in this court and out of it, that the power of regulation there conferred on Congress is limited to commerce with foreign nations, commerce among the states, and commerce with the Indian tribes. While bearing in mind the liberal construction, that commerce with foreign nations means commerce between citizens of the United States and citizens and subjects of foreign nations, and commerce among the states means commerce *between the individual citizens of different states*, there still remains a very large amount of commerce, perhaps the largest, which, being trade or traffic between citizens of the same state, is beyond the control of Congress."

In the case of *Henderson et al. v. Mayor of the City of New York et al.*, 92 U. S. Reports, s. c., 259, the court, on page 270, says:

"As already indicated, the provision of the constitution of the United States, on which the principal reliance is placed to make void the statute of New York, is that which gives to Congress the power 'to regulate commerce with foreign nations.' As was said in *United States v. Holliday*, 3 Wall. 417, 'commerce with foreign nations means commerce between citizens of the United States and citizens or subjects of foreign governments.' It means trade, and it means intercourse. It means commercial intercourse between nations and parts of nations, in all its branches."

In the case of *O'Neil v. The State of Vermont*, 144 U. S. 323, Law. Ed., page 452, Justice Field, dissenting from the opinion, which decided that no federal ques-

tion had been properly raised, defines the necessary elements constituting interstate commerce, and on page 460, Law. Ed., says:

"But in either view, whether considered as absolute sales or executory contracts of sales, they were, as already stated, transactions of interstate commerce. They were made between citizens of different states, and involved the transportation of the article sold from one state to another. A sale of an article between such citizens and its transportation from one state to another for delivery to the purchaser are the essential elements of interstate commerce. As said by this court in *Welton v. Missouri*, 91 U. S. 275, 280 (23: 347, 349), commerce comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale and exchange of commodities between the citizens of our country and the citizens or subjects of other countries, and between the citizens of different states."

And further along in the opinion Justice Field says:

"The transactions considered in this case, which extended over a period of three years, can not be described without showing that they embody the elements which constitute interstate commerce—sales of goods by a citizen of one state to a citizen of another state and their transportation between the states in their delivery to the purchaser. These facts must have been seen by the supreme court of Vermont. They were facts constantly presenting themselves and could not have been overlooked. Nor can it make any difference what motives may be imputed to the parties on the side in selling, and on the other in purchasing the goods; the only inquiry which can be considered is, Were the goods bought and sold subjects of lawful commerce? for if so, they were, in their transportation between the parties—citizens of different states—until their delivery to the purchaser or consignee in the completion of the contracts of sale, under the protection of the commercial power of congress."

In the case of *Bacon v. Illinois*, 227 U. S. 504, the court, on page 516, says:

"The property was held by the plaintiff in error in Chicago for his own purpose and the full power of disposition. It was not being actually transported and it was not held by carriers for transportation. The

plaintiff in error had withdrawn it from the carriers. The purpose of the withdrawal did not alter the fact that it had ceased to be transported and had been placed in his hands. He had the privilege of continuing the transportation under the shipping contract, but of course he might avail himself or not as he chose. He might sell the grain in Illinois or forward it as he saw fit. It was in his possession with the control of absolute ownership."

In the case at bar the plaintiff in error had never parted with the ownership of the property. It had never been delivered to a common carrier. He had merely received orders for beer, no particular cases being mentioned, and had loaded up the number of cases ordered by the different customers in his own wagons and taken the same to Kansas in his own conveyances, and such property was his until delivered, and, as stated before, the person who had ordered beer from him had no interest or estate in the beer in the wagons of the plaintiff in error. It was in his possession with the control of absolute ownership, and he could have delivered it or he could have returned it to Stillings, Missouri, or could have placed it in his own cellars, and the person ordering at no time, until delivery was made, had any interest in the particular beer in the wagons of the plaintiff in error.

Should this court hold that where a citizen of one state receives orders from a citizen of another state and accepts such orders in the other state, and then in person or by his agent delivers such goods to the person so ordering and collects pay therefor, such citizen is engaged in interstate commerce and protected by the interstate commerce clause of the constitution? We do not believe the court will hold that where such transactions occur between citizens of the same state that such transactions constitute interstate commerce, and that the persons making such transactions are protected by the commerce clause of the constitution from the pains and penalties provided for the violation of the laws of their state.

The decisions that we have just cited are especially valuable, we think, as throwing light upon the question of whether the plaintiff in error was engaged, in good faith, in interstate commerce. The transactions which the plaintiff in error testifies he was engaged in, with reference to the handling of intoxicating liquors, clearly shows that he was not engaged, in good faith, in interstate commerce. The plaintiff in error was a citizen of the state of Kansas, obligated to obey the laws of the state of Kansas. The constitution and the laws of his state prohibited the sale of intoxicating liquors within the state and prohibited the taking of orders for the sale of intoxicating liquors. For years he had been engaged, in Leavenworth, Kansas, in the unlawful sale of intoxicating liquors in violation of the constitution and laws of his state, and he had maintained the warehouses for carrying on such unlawful business at numbers 117 and 117½ Delaware street, in the city of Leavenworth, Kansas, and he was selling intoxicating liquors in open and flagrant violation of the laws of his state to the citizens of Leavenworth, Kansas, and he was making a specialty of family trade in these intoxicating liquors, and when the state of Kansas, through its supreme court, undertook to stop the kind of business which he was engaged in, the plaintiff in error ceased storing his liquor in Kansas and commenced to store it in Stillings, Mo., and then, still a citizen of the state of Kansas, continued to sell intoxicating liquors to his customers in Kansas, using his own conveyances, using the warehouses located at 117 and 117½ Delaware street, Leavenworth Kansas, as one of the places for the purpose of carrying on his business, keeping his teams there, starting out from such place every morning to Stillings, Mo., keeping his telephones at this place, keeping his advertisements in the papers, advertising himself as a dealer in liquors and giving the number of the telephone in his warehouses at 117 and 117½ Delaware street, Leavenworth, Kansas. The plaintiff in error, as stated above, is and has been all the time a citizen of the state of Kansas.

The people with whom he was doing the greater part of his business were and are citizens of the state of Kansas. The plaintiff in error is under the protection of the laws of the state of Kansas and is subject to the penalties of such laws, and these laws provide, among other things, that it shall be unlawful for any one to sell intoxicating liquors within the state of Kansas, and unlawful for any one to solicit orders for the sale of intoxicating liquors. The plaintiff in error, according to his own statement, does sell intoxicating liquors within the state of Kansas, for it is clear, under the authorities hereinbefore cited, that the sales were and are made in the state of Kansas. He admits that the manner of carrying on his business at the time this suit was brought differed but little, if at all, from his manner of carrying on the same business when he was engaged in the open and notorious violation of the laws of his state, the state of which he is a citizen and the state under whose laws he lives and whose protection he invokes. He admits that his only purpose in storing his liquor in Stillings, Mo., was to avoid the pains and penalties which he had reason to believe were about to be visited upon him if he continued to maintain his storehouse in Leavenworth, Kansas. But he seeks to escape the consequences of his acts by saying, in substance, that he had devised a scheme whereby he could cover his otherwise unlawful acts with the protecting shield of the interstate commerce clause of the constitution. When he is brought into the court he comes and asks the court's protection and asks that the court do not enjoin him from violating the laws of his own state, and as a reason for his position he admits that he is a citizen of Kansas; that he is amenable to its laws; that the laws of the state prohibit the sale of intoxicating liquors in Kansas, and that he, in order to evade the consequences of these laws, still a resident of the state and claiming the protection of its laws, has established a warehouse in the town of Stillings, Mo., just across from the city of Leavenworth,

Kansas, for the purpose of storing intoxicating liquors therein and handling the same from such warehouse; that one of the purposes, if not the chief purpose, of establishing such warehouse was to enable him, a citizen of Kansas, to make executory contracts in Missouri for the sale of intoxicating liquors and to carry out and complete such contracts and sell such liquors within the state of Kansas; that he, through his agents, received orders from various and divers parties in Kansas for intoxicating liquors; that some of these orders came by telephone to his place in Leavenworth and some to his place at Stillings, Mo.; that some came by mail addressed to him at Leavenworth, and that, in pursuance of his purpose to evade the laws of his state, when he received such letters in Leavenworth and knew what they contained, he sent the same or carried the same with him to Stillings, Mo., and there opened his letters and filled the orders that were therein contained; and that he, still a resident of Kansas, by himself or through his agents, temporarily and for this purpose only, stationed at Stillings, accepted such orders, loaded up his wagons, hauled such intoxicating liquors across the bridge into the state of Kansas, and there proceeded to carry out the terms of the executory contract which he, a citizen of Kansas, had made with various other citizens of Kansas, delivering the intoxicating liquors under such contracts in the state of Kansas, collected money therefor, did everything sufficient to complete the sale in Kansas, and he now seeks to evade the consequences of what otherwise would be a violation of the laws of his state by claiming that by the mere act of putting his warehouse in Missouri he constituted himself a person engaged in interstate commerce. He is here claiming that when he brought his liquor from Stillings, Mo., into the state of Kansas and shipped it out from Leavenworth to people in Os-kaloosa, Topeka and other cities in the state of Kansas, he was engaged in good faith in interstate commerce, and he makes this claim notwithstanding the fact that

he made the transfer to Stillings, Mo., because he feared he was about to be prosecuted for violation of the laws of his state, and notwithstanding the fact that he still advertises himself as a dealer in liquor in Kansas and still keeps his telephones and his wagons at numbers 117 and 117½ Delaware street, in the city of Leavenworth, Kansas; and that he goes around with his empty wagons to his customers and gathers up the empty cases and hauls them to the depot in Leavenworth or to his warehouse at numbers 117 and 117½ Delaware street, Leavenworth, Kansas, and from there returns them, not to himself at Stillings, but to the person from whom he originally purchased the liquor that was contained therein.

Such acts on the part of plaintiff in error were justly characterized by our supreme court in the case of *The State of Kansas v. Rabinowitz et al.*, 85 Kan. 841, as cunningly devised shifts and subterfuges intended to baffle the officers and defeat the purpose of the law. The supreme court in that case says:

"It is suggested that the sales of liquors taken from a warehouse in Missouri and brought into Kansas, where it was sold and delivered to purchaser, can not be enjoined, as it would be an interference with commerce between the states. It appears from the petition that the sale and delivery of the liquor was made by the appellees themselves and that the delivery was made and the sales consummated within the state. The appellees were, therefore, punishable under the laws of the state and the nuisance maintained by them in Kansas was subject to the restraining power of the district court. Parties can not escape the condemnation of the law by storing liquors beyond the state line and then carting them back into the state, making periodical or occasional trips to certain places where the liquors are sold, and delivering them to persons on this side of the state line."

If the position taken by the plaintiff in error in this matter is correct, and if it should be sustained by the federal courts, a severe blow will have been struck at the integrity of the laws of the state of Kansas and

of the laws of other states and municipalities throughout the entire country which seek to prohibit, regulate or control the sale of intoxicating liquors.

Can it be said that such transactions as those set out by the plaintiff in error in his testimony constitute interstate commerce in good faith?

If the petition of the plaintiff in error is tenable, then the bootlegger of Kansas becomes the ward of the federal courts; for any bootlegger in Kansas can take his empty suit case and start for the state of Missouri, leaving word with his bibulous customers to call him up when he reaches a certain saloon or place in Missouri; and when such persons call him up can solicit from them and receive orders for him to bring them, in Kansas, quarts, pints, or jugs of Missouri whisky, can fill his suit case with the same, return to his own state and go around to the various parties who have talked with him over the phone, deliver his goods, collect his money, and, when he is arrested and haled into the courts of Kansas, claim that he is engaged in interstate commerce in good faith, and can rush into the United States courts and obtain a judgment and decree holding such defendant to be engaged in the *bona fide* business of carrying on interstate commerce.

Under the meaning sought to be placed upon the term "interstate commerce" by the plaintiff in error in this case, a citizen of Kansas, in order to successfully carry on the sale of intoxicating liquors in Kansas, will only have to adopt the following simple plan, and in the carrying out of that plan will be backed by the whole power of the federal government and supported, if need be, by the army and navy forces of the country, and that plan is this:

He rents him a little shack in Kansas; inserts an advertisement in the papers telling the people that he is engaged in the liquor trade and caters especially to family business; then goes to Kansas City, Missouri, leaving word with his customers and friends

by word of mouth or advertisement in the newspapers to call him up when he reaches a saloon or wholesale house in Kansas City, Missouri. These customers, when he reaches this place, call him up and one tells him to bring him three pints of Shawhan, another wants some Cedarbrook, another orders a quart of Yellowstone, and some more proud even, liking a Scotch highball, order a bottle of King William or Haag & Haag. He gets his liquors pursuant to orders, marks the names of his friends and customers on the bottles, puts them in his suit case and goes back to Kansas, takes his goods into his shack, notifies his friends that he has arrived from his "interstate commerce trip"; they come to his place, he delivers to them the liquors so ordered, collects his money, and applies to his guardian, the federal court, for protection against the efforts of state officers to interfere with interstate commerce, and seeks the shield of the interstate commerce clause of the constitution; and when haled before a state court makes the defense that he, a citizen of Kansas, is engaged in the *bona fide* business of carrying on interstate commerce. And yet, in what way do the business transactions cited differ materially from the business in which the plaintiff in error admits he was engaged?

How can a citizen of Kansas, living in Kansas, by the mere establishing of a warehouse in Missouri, and by the receiving of orders at such warehouse, and by carrying them from such warehouse to Kansas, sell such liquors in Kansas and escape the penalties provided by the law of his state for any one who sells intoxicating liquors within its borders?

It is an entirely different proposition than where a resident of Missouri, engaged in a lawful business in Missouri, as a part of that business, ships, in compliance with orders received by him, intoxicating liquors into Kansas in good faith.

All through the decisions of the federal courts runs the expression "engaged in good faith in interstate

commerce." How can it be said that under the admissions of the plaintiff in error he is, in good faith, engaged in interstate commerce?

In passing upon this case when before the supreme court of Kansas, that court looked through the pretenses and subterfuges practiced by the plaintiff in error to the real intent and the real acts of the plaintiff in error, and properly held that "a citizen of this state, whose business is prohibited here, can not, under the guise of moving his stock in trade across the state line and other shifts and devices to evade the statutes of the state, continue the prohibited business here and be immune from the penalties of our law." And further held that "where the commerce clause of the federal constitution is invoked as a protection to traffic in intoxicating liquor, the courts are not precluded from an inquiry into methods and practices to determine whether the transactions involved constitute legitimate interstate commerce, or are colorable merely and intended to evade and defeat the just operation of the constitution and laws of this state."

The State v. Kirmeyer, 88 Kan. 589.

Further in the opinion, at page 590, the court sums up the material findings of fact and quotes the testimony as follows:

"Findings of fact were made too lengthy for insertion here. The material facts found and stated by the district court are as follows: The defendant is a resident of Leavenworth and a dealer in beer, in which business he has been engaged for many years. Before the year 1907 his place of business, warehouse and barn were in the city of Leavenworth. About that date he moved his place of business to Stillings, Mo., one and one-half miles from Leavenworth, where he has ever since kept an office and warehouse, where he receives beer in carload lots. He pays a revenue tax to the federal government, a merchant's tax in Missouri and taxes upon his property located in that state. He has no license to sell liquor in this state. His office in Stillings is connected with the telephone exchange in Leavenworth. He receives orders there by mail and telephone for beer, which, if accepted, he fills by tagging

the cases, kegs or casks with the names of the persons giving the orders, and deliveries are then made in the original packages by his own teams and wagons or by deliverymen. About 85 per cent of the orders from persons residing in Leavenworth are by telephone, and his trade in that city amounts to about \$500 per month. Orders from persons in other places are filled by tagging and hauling the beer to the railroad depot in Leavenworth, and bills of lading are given from that point. There is a freight depot, but no station agent, at Stillings, and no post office. Some beer is received by him at the station in Leavenworth and hauled therefrom by his teams to the Stillings warehouse. The defendant's drivers do not solicit orders or make collections. The defendant makes collections, usually in person, or by collector, and some payments are made by mail. He does a family trade in Leavenworth, selling beer only for private use. When he moved his place of business to Missouri he moved his teams and wagons theretofore used in the business from another place in the city to 117 Delaware street, Leavenworth, and installed telephones there, numbered 313, which he still maintains. Occasionally orders for beer are given over such telephones to No. 117 Delaware street, but are answered by requesting that the place of business at Stillings be called up. Mail orders are also occasionally addressed to the defendant at Leavenworth, but are either taken or sent by him to his place of business at Stillings before being opened. Ever since he became engaged in the business the defendant has carried advertisements in two newspapers in Leavenworth, reading:

“ ‘Michael Kirmeyer
Stillings, Missouri.
Rochester Beer.
Family Trade Especially.
Phones 313.’

“The telephone numbers were not changed through oversight when he changed his place of business to Missouri. In making deliveries from the Stillings warehouse and at the Leavenworth depot his wagons use the Missouri river bridge and the streets and alleys of the city of Leavenworth. The teams and wagons stand upon these streets while deliveries of beer ordered and tagged as before stated are being made.

“The following finding was also made:

“ ‘The defendant's residence in the city of Leavenworth, Kansas, and the keeping by him of his teams

and wagons used by him in his said business, in said city, is not intended as a subterfuge or a shift or device on his part to circumvent or defeat the prohibitory laws of the state of Kansas. Neither is the fact that mail is occasionally addressed to him at Leavenworth, Kansas, instead of Stillings, Missouri, nor the fact that he maintains telephones at his stables in the city of Leavenworth, Kansas, and advertises in said papers above mentioned, intended by him as a shift, and none of these circumstances actually tend to circumvent or defeat the laws of the state of Kansas.'

"The testimony of the defendant further shows that he has resided in Leavenworth thirty years, and has been in the liquor business 'off and on' since he was old enough. About four or five years before the trial, when receivers in cases pending in this court against several brewing companies came to Leavenworth, he 'moved across' to Stillings. Stillings contains one store, a round-house and ten or fifteen residences and eight or ten beer warehouses. Occasionally beer is shipped to the defendant over a railroad, consigned to Leavenworth. This beer is hauled in defendant's wagons from the depot in Leavenworth to his warehouse in Stillings. Deliveries by wagon are only made in Leavenworth. Empties from the Leavenworth trade are all gathered up by the drivers, hauled to and shipped from the Leavenworth depot to a brewery in Kansas City, Mo., without being taken to Stillings. Sometimes empties are kept in the barn at No. 117 Delaware street over night, where the wagons and teams are kept for making deliveries.

"To further indicate the nature of the defendant's business we quote from his testimony:

" 'Before I moved across I received my liquors here in Leavenworth. I have been receiving my liquors at Stillings since I moved across. There is a freight depot at Stillings, but no agent there. I am a dealer in a beer known as Rochester beer. It comes from Kansas City, Mo. That is the only beer I handle. Nearly all of it comes to Stillings in carload lots. I handle nothing but beer. The beer comes to me in regular beer cases, barrels and kegs. Some of the cars come to me over the Burlington and some over the Chicago Great Western. Some of it comes over the Missouri Pacific. Where it comes over the Missouri Pacific it is unloaded at the freight depot in Leavenworth and I haul it across the river in my own wagons.

I do not deliver any from the Missouri Pacific depot in Leavenworth. When I get an order for beer from Oskaloosa, Topeka and other points in Kansas I bring the beer over to the freight depots in Leavenworth, Kan., in my own wagons and ship it out from there. I do this because there is no freight agent at Stillings, Mo. Leavenworth is the only place to load it. Ever since I have been doing business at Stillings I have had stables and a warehouse at No. 117 and 117½ Delaware street, in Leavenworth, Kan. I keep my horses and wagons there. I have quite a few wagons there. These horses and wagons belong to me. I have both Leavenworth telephones at Stillings, Mo. The numbers of these phones are 54 on the Bell and 101 on the Peoples. I have both phones at my stables, at No. 117 and 117½ Delaware street, in Leavenworth. Both of these phones have the same number. It is 313. I also have a telephone at my home in Leavenworth. I receive my orders for beer at Stillings, some by letter and some by phone. There is no postoffice at Stillings. I get my mail in Leavenworth, but I do not open up my beer orders there. I either remail them to Stillings or take them over there before opening them. I open up personal letters in Leavenworth.

“Q. What per cent of your orders for beer from Leavenworth, Kan., do you receive by mail? A. Well, we do not get but about 15 per cent.

“Q. Then 85 per cent from Leavenworth are telephone orders? A. Yes, sir. My telephones are all connected directly with “central” at Leavenworth. I pay no toll except my monthly bill.

“Q. The same as any other telephone. Now, Mr. Kirmeyer, you receive orders for beer at No. 117 Delaware street, do you not? A. Why, once in a while. We tell them to call up the other number. . . .

“Once in a while a driver lays off or there is a rush, and then I hire a wagon to deliver for me. I pay them. My wagons usually come over once a day. Sometimes we fill special orders. If customers are in a rush we accommodate them. I can not name any customer who is charged for delivering beer to him. I can not remember a single case in which I have made any charge for delivery. My drivers are not supposed to take orders for beer as they go around to make deliveries. They do not do this that I know of. Most of my trade in Leavenworth is what is called “family trade.” My drivers deliver the beer at residences. When the order

is received at Stillings over the telephone the name of the party is put on a tag or label, this is either given to the driver or put on a case of beer in the warehouse at Stillings, and then my drivers haul the cases across the Missouri river and deliver them. We use the streets and alleys of Leavenworth in making these deliveries. . . .

"My drivers take up the empties around town. They load them in a car in the yards here in Leavenworth, and when the car is filled I ship them back to Kansas City, Mo.

"Q. Now, when your drivers go around to take up these empties they sometimes collect from customers, don't they? A. Why, they do if I give them a bill, a statement.

"Q. And how often do you give them a bill to collect when they take up empties? A. Well, I could not remember as to that.

"Q. About how often? A. Oh, I could not say; it depends on what locality they are going to and who the customers are. Most of the people I collect from.

"Q. What did those receivers do here, so far as you were concerned? A. Why, they scared everybody up.

"Q. After that you moved across the river? A. Everybody moved.

"Q. You have more family trade than you had then? A. Why, yes; in family trade.

"Q. Did you do any family trade before you went to Stillings? A. Yes, sir.

"Q. Delivered liquor at residences? A. Delivered beer.

"Q. Delivered beer at residences. What change, if any, has been made in your method of doing business, so far as the family trade is concerned, since you went to Stillings? A. Well, there ain't much change in the way of doing business.

"Q. Do you place these labels on yourself or furnish them to the drivers? A. I give them the labels and they paste them on.

"Q. All liquor you ship to Oskaloosa you bill out from Leavenworth? A. We bill it Stillings and they bill it Leavenworth.

"Q. You send your driver with beer here to the depot in Leavenworth and they ship it from Leavenworth? A. I make out the bill of lading.

"Q. Where do you deliver it to the railroad company? A. At their depot.

"Q. They don't take the bill of lading you make out? A. They change it from Stillings to Leavenworth.

"Q. They do not accept it as shipping it from Stillings? A. Well, they have.

"Q. They have no depot? A. No, they have no depot.

"Q. The first place it passes out of your hands is in the city of Leavenworth? A. At the depot.

"Q. Up to that time you have it in your possession, the possession of your driver? A. Yes, sir.

"Q. And the bulk of your shipments to Kansas points are billed from the city of Leavenworth, are they not? A. Yes, sir.

"Q. And never pass out of your hands until they reach the city of Leavenworth? A. Why, of course not.

"Q. Now, I believe you said that when any one would call you up at No. 313 here for an order, you would tell them to call up at Stillings. Is that right? A. Yes, sir.

"Q. When they do call up there at No. 313 and ask for beer, you tell them to call up Stillings? A. I would say, "Call up across the river."

"Q. Prior to the appointment of these receivers you were in business here? Yes, sir.

"Q. And the only purpose you had in moving from here to Stillings was on account of the excitement and the way they were going after them for selling liquor. A. No, it was on account of the law.

"Q. As a matter of fact, at that time you had a lot of customers? A. Yes, sir.

"Q. And on account of the enforcement of the prohibitory law you moved across the river? A. They told me I had to move.

"Q. How much of your mail would you say you get over here? A. I do not get but very little mail.

"Q. You get orders for beer over here? A. No, sir.

"Q. None of them? A. Oh, they might send in one once in a while and I would send it back, just as I stated this morning, if I think it is a beer order. I can always tell; there is only a few towns I get them from; I cross it off and address it to Stillings.

"Q. Why is it you take out of your box a letter which you think contains a beer order and send it to yourself at Stillings and not open it here? A. I might take it over myself.

"Q. Why do you not open it? A. Because it is against the law.

"Your purpose in carrying it back—your purpose in putting it back in the post office and carrying it to Stillings is to keep from violating the law? A. They aren't very few of those.

"Q. Is that the purpose. A. Yes, sir.

"Q. Now, this beer from which these orders were filled, how was it kept—all in one mass? A. It was all piled up in a pile.

"Q. And when you go to fill the various orders you pick up the cases and have them labeled with the names of the party to whom you want them to go, and then the drivers take them to the various parties; is that right? A. Yes, sir."

The court in its opinion says, page 598:

"The question to be determined here is whether the facts proven are sufficient to bring the case within these principles. The defendant contends that his business is protected as interstate commerce under the commerce clause of the federal constitution. It appears that he was keeping for sale and selling beer for years in Leavenworth in violation of law until he became alarmed by the appearance of receivers in prosecutions against brewers. He says this 'scared everybody up,' and, as he says, 'everybody' moved across the river, and admits that there was not much change in the way of doing business. The principal changes appear to be the storage of his stock just across the river in Missouri, where eight or ten liquor warehouses were established convenient to Kansas, but where there was no station agent or post office. At the time when he thus moved across he leased another place in Leavenworth, equipped it with telephones, quartered his teams and wagons there, and continued to use them in making deliveries as he had before done. When orders were received at this place in Leavenworth by mail he took or sent them into Missouri before even opening them. Applicants for beer by telephone at the number carried in his advertisement were told to call up across the river. Although his drivers did not take orders to his knowledge, they made collections when he gave them bills for that purpose. Empties were handled directly from the Leavenworth place of business to the Leavenworth depot. Shipments to points in Kansas outside the city were made at the same depot. Kegs and other receptacles were labeled by the de-

fendant or by his teamsters to fill orders in Leavenworth, and hauled daily to customers in the city. Why was this warehouse established just across the river, which required over a mile of extra hauling and the payment of tolls at the bridge? Why were letters received by the defendant in person at his place of business in Leavenworth, remailed to be again delivered to himself at Stillings, a mile and a half away? Why did he refrain from opening orders for beer until he was across the bridge? In short, why did he resort to these new methods? It is not unjust to the defendant to say that his own testimony furnishes the answer. 'It was on account of the law.' Plainly stated, these things appear to have been done to evade the laws of this state—to carry on business of the character theretofore done in violation of law in such a manner as to avoid its penalties.

"We do not overlook finding No. 15, quoted above, that these things were not intended as a shift and that none of these circumstances tended to circumvent the law, but this finding is a conclusion or complex fact deduced from the underlying, basic facts found and stated in detail and which do not support the conclusion. Neither is it supported by the testimony of the defendant himself.

"The finding that the telephone numbers 313 were not changed through oversight relates to the advertisement. The telephone service by that number was installed at 117 Delaware street, when the move was made across the river, as shown by other findings and by Mr. Kirmeyer's testimony. Such practices as the storage of liquor across the state boundary, the re-mailing of letters received in Kansas, to himself in Missouri, and the repetition of telephone orders across the line, can not give the high sanction of the federal constitution to an otherwise unlawful traffic.

"An interpretation of the law which gives effect to the mere form without regarding the substance only serves to bring its administration into reproach. The broad question here is whether the defendant was really engaged in commerce between the states of Missouri and Kansas, or was he only seeking by tricks and devices to evade the laws of his state—doing by indirection that which could not lawfully be done by ordinary and direct methods? Real interstate business needs no such methods to establish its character, and a wholesome regard for the administration of justice will not tolerate such evasions."

In *Austin v. Tennessee*, 179 U. S. 343, this court said:

"Without undertaking to determine what is the proper size of an original package in each case, evidently the doctrine has no application where the manufacturer puts up the package with the express intent of evading the laws of another state, and is enabled to carry out his purpose by the facile agency of an express company and the connivance of his consignee. This court has repeatedly held that, so far from lending its authority to frauds upon the sanitary laws of the several states, we are bound to respect such laws and to aid in their enforcement, so far as can be done without infringing upon the constitutional rights of the parties." (p. 360.)

In the case of *Cook v. Marshall County*, 196 U. S. 261, it was said:

"While it is doubtless true that a perfectly lawful act may not be impugned by the fact that the person doing the act was impelled thereto by a bad motive, yet where the lawfulness or unlawfulness of the act is made an issue the intent of the actor may have a material bearing in characterizing the transaction. . . . So where the lawfulness of the method used for transporting goods from one state to another is questioned, it may be shown that the intent of the party concerned was not to select the usual and ordinary method of transportation, but an unusual and more expensive one, for the express purpose of evading or defying the police laws of the state. If the natural result of such method be to render inoperative laws intended for the protection of the people, it is pertinent to inquire whether the act was not done for that purpose, and to hold that the interstate commerce clause of the constitution is invoked as a cover for fraudulent dealing, and is no defense to a prosecution under the state law. . . . The power of congress to regulate commerce is undoubtedly a beneficent one. The police laws of the state are equally so, and it is our duty to harmonize them. Undoubtedly a law may sometimes be successfully and legally avoided if not evaded, but it behooves one who stakes his case upon the letter of the constitution not to be wholly oblivious of its spirit." (pp. 271, 272, 273.)

It is clear that the supreme court of Kansas was right in saying that the basic facts found by the trial court did not uphold the finding, 15, of the trial court, that these things were not intended as a shift and device, and that the court was right in holding that such finding was a conclusion or complex fact deduced from the underlying, basic facts found and stated in detail, and that these basic facts did not support the conclusion, and that such conclusion was not supported by the testimony of the plaintiff in error himself, and that the basic facts must prevail over such conclusion. We think it is clear that the supreme court of Kansas was right in finding from the testimony of the plaintiff in error that the business he was engaged in was not legitimate interstate commerce, but was carried on in violation of the statutes of his state, and that the same was subject to abatement and injunction. Whether the court, under the laws of Kansas, could make the injunction as broad as prayed for in the petition is not a question before this court, as it involves the construction of no federal statute and raises no federal question. The sole question before this court is whether the facts show that the plaintiff in error was, in good faith, engaged in interstate commerce; and we respectfully submit that the judgment of the supreme court of Kansas should be affirmed.

JOHN S. DAWSON,

Attorney-general of the State of Kansas.



KIRMEYER v. STATE OF KANSAS.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 145. Argued January 22, 1915.—Decided March 1, 1915.

Beer is a recognized article of commerce, and the right to send it from one State to another, and the act of doing so, are interstate commerce, the regulation whereof has been committed to Congress, and a state law interfering with or handling the same conflicts with the Federal Constitution.

Transportation is not complete until delivery to the consignee or the expiration of a reasonable time therefor and prior thereto the provisions of the Wilson Act of August 8, 1890, do not apply.

Whether commerce is interstate or intrastate must be tested by the actual transaction; it does not depend upon the methods employed, distance between the points, or the domicile or character of the parties engaged therein.

The packages in which goods involved in this case were transported in interstate commerce were those customarily used for transportation of such articles, and not a mere plan or device to defeat the policy of the State, and the rulings in that respect in *Austin v. Tennessee*, 179 U. S. 343, and *Cook v. Marshall County*, 196 U. S. 261, do not apply.

88 Kansas, 589, reversed.

THE facts, which involve the construction and application of the Commerce Clause of the Federal Constitution, are stated in the opinion.

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Mr. A. E. Dempsey, with whom *Mr. Frank Doster* was on the brief, for plaintiff in error.

Mr. John S. Dawson, Attorney General of the State of Kansas, for defendant in error, submitted.

MR. JUSTICE McREYNOLDS delivered the opinion of the court.

The State of Kansas instituted this cause in a local court, September 29, 1910. Kirmeyer was charged with carrying on a liquor business at Leavenworth in open and persistent violation of law and thereby committing a nuisance. The relief sought was "that he be enjoined from conducting said unlawful business; that he be enjoined from maintaining, using and employing said wagons, vehicles, conveyances, horses, mules, telephones and any other property in the said unlawful manner herein alleged; that upon the final determination of this action said injunction be made permanent; that said wagons, vehicles, conveyances, horses, mules, telephones and other property used in said unlawful business be declared common nuisances and that the same be abated."

In the opinion of the trial court the transactions disclosed constituted a part of interstate commerce within the protection of the Constitution of the United States; and judgment was rendered for Kirmeyer. Upon appeal the Supreme Court of the State declared, "The broad question here is whether the defendant was really engaged in commerce between the States of Missouri and Kansas, or was he only seeking by tricks and devices to evade the laws of his State—doing by indirection that which could not lawfully be done by ordinary and direct methods." Referring to numerous opinions of this court it further said they "do not preclude a fair inquiry into methods and practices in order to determine whether transactions

under investigation constitute legitimate interstate commerce or are colorable merely and intended to evade and defeat the just operation of the constitution and law of the State." And the conclusion was— "It is true that a citizen of Kansas who finds that his business is prohibited by our laws may in good faith engage in the same business in another State where the legal obstacle does not exist. But he may not under the guise of moving across the state line, and other shifts or devices to evade the statutes of the State, continue in the prohibited business here and be immune from the penalties of our law. From the facts found by the court and from the testimony of the defendant, it appears that his business was not legitimate interstate commerce but was carried on in violation of the statutes of this State and is subject to abatement and injunction." Accordingly the action of the district court was reversed with instructions to grant the relief prayed for (88 Kansas, 589, 600, 603). Thereupon this writ of error was sued out.

The essential facts disclosed by the record are summarized in paragraphs (a) and (b) following.

(a) Rigorous statutes have long prohibited the sale of intoxicating liquors within the State of Kansas. The city of Leavenworth lies on the Missouri River; on the opposite bank in Missouri is Stillings, a village with one store, roundhouse, a few residences, eight or ten beer warehouses, and a freight depot without a regular agent, but no post office. For a long time plaintiff in error has resided in Leavenworth and prior to 1907 he carried on there an illicit beer trade; for use in the same he there maintained a business place and warehouse and kept wagons and teams. In that year, alarmed by the activities of officials, he discontinued this office and warehouse and immediately opened others in Stillings and connected them with the Leavenworth telephone exchange. He did not change his residence nor remove his wagons and teams

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from Leavenworth but kept them in quarters connected by telephone with the local exchange and continued to use them for hauling to and from the new warehouse and making deliveries. Thereafter he received at Stillings barrels, cases and casks of beer in carload lots from Kansas City and other points; sometimes he received like merchandise at the railroad depot in Leavenworth which was then hauled across the river. At the Stillings office he received and accepted orders for beer to be delivered in Leavenworth and other points in Kansas. Eighty-five per cent. came by telephone; the remainder through the Leavenworth post office, but these were carried to his place of business before being opened.

(b) Accepted orders for delivery in Leavenworth were filled by setting aside the cases, kegs or casks in the warehouse, tagging them with the names of the purchasers, and then sending them daily—sometimes oftener—over the bridge in his wagons to the residences of purchasers. For such deliveries no charges were made. If the goods were intended for other points in Kansas they were hauled to the railroad station at Leavenworth and there turned over to the carrier. The business for the most part was "family trade" for private use only and amounted to some \$500 per month. A license tax was paid to the Federal Government; also merchant's and *ad valorem* taxes to Missouri; he had no Kansas license. The empty cases were gathered up by the drivers throughout Leavenworth, loaded in cars there and shipped to some other State. Advertisements in two Leavenworth papers announced his business and location at Stillings, and likewise gave the telephone number at the horse barn. When parties desiring beer called over this telephone they were advised to call the Stillings office. Collections were usually made by the plaintiff in error or by collectors; sometimes by mail. Drivers received no orders from purchasers.

The instant cause arose before passage of the Act of

Congress, approved March 1, 1913, c. 90, 37 Stat. 699, known as the Webb-Kenyon Bill; consequently neither its construction nor application is now involved; and what is said herein of course has reference to conditions existing prior to that enactment.

Former opinions of this court preclude further discussion of these propositions: Beer is a recognized article of commerce. The right to send it from one State to another and the act of doing so are interstate commerce the regulation whereof has been committed to Congress; and a state law which denies such right or substantially interferes with or hampers the same is in conflict with the Constitution of the United States. Transportation is not complete until delivery to the consignee or the expiration of a reasonable time therefor and prior thereto the provisions of the Act of Congress, approved August 8, 1890, c. 728, 26 Stat. 313—the Wilson Act,—have no application. *License Cases*, 5 How. 504, 577; *Leisy v. Hardin*, 135 U. S. 100, 110; *Rhodes v. Iowa*, 170 U. S. 412, 426; *Vance v. Vandercook Co.* (No. 1), 170 U. S. 438, 444; *American Express Co. v. Iowa*, 196 U. S. 133, 142, 143; *Heyman v. Southern Ry.*, 203 U. S. 270, 276; *Adams Express Co. v. Kentucky*, 206 U. S. 129, 135; *Adams Express Co. v. Kentucky*, 214 U. S. 218, 222.

The foregoing cases and those cited therein we also regard as controlling authority in support of the claim that the business carried on by plaintiff in error within the State of Kansas was interstate commerce. That the traffic moved by horse-drawn wagons from a point near the state line, instead of by railroad from a greater distance, does not change the applicable rule. Nor did the mere adoption of cumbersome and expensive methods render the business intrastate—that must be tested by the actual transactions.

The Supreme Court of the State gave much weight to the dealer's past conduct and animating purpose and re-

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lied upon language quoted from *Austin v. Tennessee*, 179 U. S. 343, and *Cook v. Marshall County*, 196 U. S. 261.

Considered in the light of our former decisions, if the business carried on by plaintiff in error after removal of his office to Stillings had been conducted by a dealer who had always operated from that place we think there could be no serious doubt of its interstate character. And we cannot conclude that a legal domicile in Kansas coupled with a reprehensible past and a purpose to avoid the consequences of the statutes of the State suffice to change the nature of the transactions. Otherwise one of two persons located side by side in the same State and doing the same business in identical ways might be engaged in interstate commerce while the other was not.

Improper application was given to what was said in *Austin v. Tennessee* and *Cook v. Marshall County*, *supra*. The point for decision in them was whether the packages containing cigarettes shipped into the State were "original" ones within the constitutional import of the term as theretofore defined. Looking at all the circumstances this court concluded they were not. The general use of like packages was unknown and impracticable in transactions between manufacturers and wholesale dealers residing in different States and the plan pursued was plainly a mere device designed to defeat the policy of the State where the goods were received—not a *bona fide* commercial arrangement. Here, no such question is presented.

A long line of opinions have discussed the legal principles involved—reiteration would be fruitless. The judgment of the court below is reversed and the cause remanded for further proceedings not inconsistent herewith.

Reversed.